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No. 04-

IN THE

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. BROWN
District Attorney
Queens County
JOHN M. CASTELLANO*
GARY S. FIDEL
Assistant District Attorneys
125-01 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-5801

* *Counsel of Record*

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does a federal circuit court of appeals have jurisdiction to hear an appeal from the dismissal of a habeas corpus petition under the statute of limitations when neither that court nor the district court has found that the petitioner has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253?

2. Should this Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), holding that a federal notice of appeal is filed on the date it is given to prison authorities, be applied in place of state filing rules in determining the period of tolling for state post-conviction applications under the habeas corpus statute of limitations?

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The memorandum decision of the United States District Court for the Eastern District of New York (Block, D.J.) dismissing the petition for a writ of habeas corpus as time-barred is unreported. It is reprinted in the appendix at pp. 1a-4a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On April 7, 2003, Eastern District Judge Frederick Block dismissed the petition as time-barred under the statute of limitations.

On March 17, 2005 the Second Circuit entered an order vacating the judgment and remanding the case to the District Court for proceedings consistent with the Second Circuit's order in this case and in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), which was argued together with this case and decided the same day.

This petition for certiorari is filed within ninety days of the Second Circuit's order, and is therefore timely. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2253(c) of Title 28 of the United States Code provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2244(d) of Title 28 of the United States Code provides:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the

pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Chapter 22, Section 600.2(a)(6) of the New York Code of Rules and Regulations provides in pertinent part:

All papers may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt: and the envelope must be marked "Motion Papers." If an acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed postage-prepaid postal card bearing the title of the cause, the nature of the motions, the date on which it is returnable, and a statement of the papers filed. Such postal card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

STATEMENT OF THE CASE

On November 15, 1995, respondent Almein Cain and four accomplices forced their way into a grocery store as it was closing and announced a holdup. Cain, while brandishing an Uzi semi-automatic machine gun, corralled the two store-owners and three patrons into a freezer in the back of the store. In the freezer, Cain ordered the victims to lie on the floor and, thereafter, opened fire with the Uzi, killing four of the five victims and severely injuring the remaining victim. Meanwhile, Cain's accomplices searched for and removed the store safe. Cain and his accomplices fled the grocery store with the safe, leaving the victims for dead.

A month-long investigation for the killers ensued. One of Cain's accomplices, while voluntarily at the precinct in connection with another matter, made a statement implicating himself and Cain in the murders. The only surviving victim later

identified Cain from a series of photographs and subsequently picked Cain out of a lineup. One of Cain's other accomplices was also arrested and confessed to the crime, implicating Cain.

State Court Proceedings

After a jury trial, Cain was convicted of eight counts of Murder in the Second Degree (N.Y. Penal Law § 125.25[1] and [2]), one count of Attempted Murder in the Second Degree (N.Y. Penal Law §§ 110.00/125.25[1]), and other related charges. He was sentenced on November 24, 1997.

On July 29, 1999, Cain perfected an appeal to the New York State Appellate Division, Second Department. On April 10, 2000, that court affirmed Cain's judgment of conviction. *People v. Cain*, 271 A.D.2d 542 (2d Dept. 2000). Cain's application for leave to appeal to the Court of Appeals was denied on June 20, 2000. *People v. Cain*, 95 N.Y.2d 833 (2000).

Cain did not apply to this Court for a writ of certiorari, and his time for doing so expired on September 18, 2000, 90 days after the denial of leave. His conviction became final on that date.

Before the conviction became final, on August 24, 2000, Cain filed a *pro se* motion, pursuant to section 440.10 of the N.Y. Criminal Procedure Law, seeking to vacate his judgment of conviction. On October 30, 2000, the Supreme Court, Queens County, denied Cain's motion in its entirety. On November 28, 2000, Cain sought permission from the Appellate Division to appeal from the denial of his section 440.10 motion. That application was denied on February 5, 2001.

Cain next filed an application for a writ of error *coram nobis* in the Appellate Division, alleging ineffective assistance of appellate counsel. The application was dated July 10, 2001. It was accompanied by an affidavit of service indicating the date that the prosecution was served with the petition and stating that Cain placed copies in a prison mailbox addressed to the Queens County District Attorney on December 7, 2001, nearly four months after the date reflected in the application. Cain did not make any representation in the affidavit about the date he attempted to file the petition with the court. In a letter dated December 10, 2001, three days after the affidavit of service was notarized, Cain stated that he was the forwarding the *coram nobis* petition to the court. The petition was received by the court on December 17, 2001.

On April 29, 2002, the Appellate Division denied his application for a writ of error *coram nobis*. *People v. Cain*, 293 A.D.2d 755 (2d Dept. 2002). Cain sought leave to appeal to the New York Court of Appeals, which dismissed the application on May 20, 2002, because the order was not appealable under New York law at the time.

The Proceedings in Federal Court

Cain next filed an application for a writ of habeas corpus in the Eastern District of New York. The petition, received by the clerk on July 3, 2003, was undated and was not accompanied by an affidavit of service or an indication of the date it was given to prison authorities for filing with the court.

On August 30, 2002, Judge Frederic Block issued an order directing Cain to show cause why the petition should not be dismissed as time-barred. The District Court noted that Cain's conviction became final on September 18, 2000, and that his state court post-judgment motion, which pre-dated

September 18th, tolled the statute of limitations until February 5, 2001, the date the Appellate Division denied leave to appeal the denial of the motion. The court also noted that although Cain had stated that he subsequently filed a *coram nobis* petition, Cain had not indicated the date on which the application was filed in state court. The court additionally observed that Cain's attempt to appeal the denial of his *coram nobis* petition, which was dismissed by the New York Court of Appeals, was not an available avenue of review under New York law at the time the application was made, and that the application thus did not toll the statute of limitations under the Second Circuit's decision in *Hizbullahankhamon v. Walker*, 255 F.3d 65, 70 (2d Cir. 2001), *cert. denied*, 536 U.S. 925 (2002). The District Court ordered Cain to show cause why the petition should not be dismissed and directed Cain to indicate the date that he filed the *coram nobis* petition in state court, as well as any other circumstances indicating that the petition was timely filed.

On September 26, 2002, Cain filed an "affirmation" in response to the order to show cause. He conceded that the conviction became final on September 18, 2000, but claimed that he had given his state coram nobis petition to prison authorities on July 10, 2001, exactly four months before the date of his own letter forwarding the *coram nobis* application to the court and almost four months before he had the affidavit of service for the *coram nobis* petition notarized in prison. He also claimed that he had given his habeas corpus petition to prison authorities on June 26, 2002, although it was received on July 3, 2002. He concluded, based on his calculations, that he had filed his petition with either four or eleven days to spare.

Subsequently, Magistrate Judge Lois Bloom issued an order to show cause to the state requiring an answer to the petition. On February 27, 2002, the state moved to dismiss the

petition on timeliness grounds. The state maintained that tolling for the *coram nobis* petition commenced on December 17, 2001, the date it was received by the clerk of the state court. Applying the December 17th date, as opposed to the July 10th date, decreased the period of tolling and rendered the petition outside the statutory one-year period.

Cain opposed the motion, claiming once again that he had given his coram nobis petition to prison authorities on July 10, 2001. He did not, however, address the fact that the *coram nobis* petition was not notarized until December 7, 2001, or that his own letter forwarding the petition to the court was dated December 10, 2001, or that the motion was not received by the court until December 17, 2001.

Respondent filed a reply to Cain's opposition on March 27, 2003. The state argued that tolling for the *coram nobis* motion began on the date it was filed according to state law, which was upon receipt on December 17, 2001. Citing *Moore v. Gibson*, 250 F.3d 1295 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001); *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), *cert. denied*, 531 U.S. 1195 (2001), and *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000), the state argued that the federal prison mailbox rule, which had been rejected by New York, did not apply to state court applications and that tolling did not therefore commence when Cain claimed to have given the document to prison authorities.

On April 7, 2003, the District Court dismissed the petition as time-barred (1a). The court noted that Cain offered no explanation for the discrepancy between the date typed on the *coram nobis* application, July 10, 2001, and the date it was notarized, December 7, 2001. The court held, moreover, that the *coram nobis* application was actually "filed" on December

17, 2001, the date it was received by the clerk of the Appellate Division. The court noted that "filing" under the tolling provision was governed by state law, citing the Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and New York law provides that a petition is filed when received. The court concluded that because more than 365 days had elapsed absent the tolling for the state court motions, Cain had failed to satisfy the statute of limitations. The District Court subsequently denied a certificate of appealability.

Cain then moved for a certificate of appealabiliy in the Second Circuit. In support of his motion, Cain, in addition to disputing the dismissal of his petition on timeliness grounds, raised only one issue with regard to the alleged denial of his constitutional rights (*see* Cain's Affidavit Supporting Request for Certificate of Appealability, dated June 13, 2003, at 4, 7-8). He argued that his co-defendant's confession was illegally obtained and that his photographic and corporeal identifications were the fruit of this illegal confession.

The panel considering the motion granted a certificate of appealability, specifying only that "the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations" (*see* Certificate of Appealability, dated November 10, 2003). The panel did not find that Cain had made a substantial showing of the denial of any constitutional right. The Second Circuit directed that this case be heard "in tandem with" *Artuz v. Fernandez*, No. 03-2541, an interlocutory appeal by the state from the denial of a motion to dismiss that also presented the "mailbox rule" issue as applied to state filings that toll the statute of limitations.

On appeal, Cain acknowledged that the timeliness of his petition depended upon application of the federal "mailbox" rule to his state post-conviction application, and he also conceded

that there was a split of authority on this issue. He argued, however, that the federal mailbox rule applied to all state post-conviction applications for the purpose of determining the commencement of the tolling period, without regard to whether state rules concerning filing dictated a different result.

In response, the state raised a jurisdictional issue and opposed application of the federal mailbox rule to the tolling provision for state post-conviction applications. First, the state argued that the jurisdictional prerequisite to an appeal from the under 28 U.S.C. § 2253 had never been met. That statute, and this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), require that a petitioner make a substantial showing of the denial of a constitutional right before an appeal can be heard, but neither the District Court nor the Second Circuit panel considering the certificate of appealability made any such finding. Because the petitioner had not made that showing, and could not make such a showing even at the time of oral argument, the Second Circuit could not entertain the appeal.

The state also urged the Second Circuit to adopt the position of those Circuits declining to follow the federal mailbox rule as to the filing of state post-conviction applications. The state pointed out that a contrary interpretation was inconsistent with the definition of filing provided by this Court in *Artuz v. Bennett*, 531 U.S. 4, *supra*, in interpreting the very same tolling provision, and that it would undermine principles of federalism and comity central to habeas corpus jurisprudence to superimpose the federal mailbox rule on states that had declined to adopt it.

In a decision dated March 17, 2005, the Second Circuit entirely failed to address the jurisdictional issue, vacated the district court's dismissal on timeliness grounds, and remanded the case to the district court for proceedings consistent with its

opinion in this case and in the companion case decided the same day, *Fernandez v. Artuz*, 402 F.3d 11 (2d Cir. 2005), *cert. pending*, Sup. Ct. Index No. 04-1540. The Second Circuit, citing to its decision in *Fernandez*, determined that the District Court should have applied the federal mailbox rule to the state post-conviction applications.

In *Fernandez*, the Second Circuit acknowledged that the federal circuit courts were divided on this issue and that local rules of New York State courts specify that a motion "shall be considered filed only upon receipt." *Id.* at 114-15. The court ruled, however, that because the state had no time limit on *coram nobis* petitions, such as filed in this case, the date of filing was irrelevant under New York law and did not render the state application "proper or improper." *Id.* at 115-16. The court offered no definition of "filing" and did not address how Congress could have intended "filing" to mean one thing with regard to state applications that included a time bar and something else with regard to other state applications.[1]

REASONS FOR GRANTING THE WRIT

This case presents two compelling issues for this Court's consideration, one that goes to the very jurisdiction of the federal circuit courts of appeals to review statute of limitations rulings in habeas corpus cases and another that has openly

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[1]The court stated that, applying the federal mailbox rule to Cain's case, it could not determine whether the petition was timely or untimely. It thus remanded the case to the District Court to determine which of three possible dates the court should use in deciding when the petition was handed to prison authorities: the date petitioner initially stated he handed the petition to prison authorities; the date of his affidavit of service on the state; or the date of his cover letter forwarding the motion to the Appellate Division.

divided the federal circuit courts. The jurisdictional question is whether a circuit court may review the denial of a writ of habeas corpus premised on timeliness grounds in the absence of the statutorily mandated substantial showing of the denial of a constitutional right. Because the Second Circuit, and some other circuit courts, routinely exercise jurisdiction over statute of limitations issues without there ever having been a finding that the jurisdictional prerequisite has been met, and because other circuit courts have adopted the opposite practice, this Court should grant review of this issue to ensure that all of the courts of appeals exercise jurisdiction only in appropriate cases.

The issue that has so openly divided the federal Circuit Courts of Appeals is whether, under the statute of limitations for habeas corpus petitions, the tolling period for state post-conviction applications commences when the application is handed to prison authorities, pursuant to the rule devised by this Court in *Houston v. Lack*, 487 U.S. 266 (1988), or when the petition would be deemed filed under state law, as suggested by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000). Most of the circuit courts have held that state rules of filing govern, but the Second Circuit has instead superimposed the *Houston* rule over the state rules. Because the circuit courts are split on this issue and because there is an important question over whether the *Houston* rule – created under much more exigent circumstances and applied only to notices of appeal in federal cases – can be extended to supercede state rules of filing concerning state post-conviction applications, this Court should grant review to resolve the issue.

I. The Second Circuit's Routine Exercise of Jurisdiction where neither that Court nor the District Courts Has Ever Determined that the Petitioner Made a Substantial Showing of the Denial of a Constitutional Right Directly Contradicts the Express Language of the Habeas Corpus Statute, as well as this Court's Decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), and the Holdings and Practices of other Circuit Courts.

Section 2253 of Title 28 of the United States Code governs the taking of appeals from final orders in habeas corpus cases. It specifically provides that an appeal "may not be taken" in the absence of a certificate of appealability and that such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This Court, interpreting that provision, has explained that "determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the District Court's procedural holding." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A certificate may issue only if the petitioner has shown that jurists of reason would find it debatable 1) whether the petition states a valid claim for denial of a constitutional right, and 2) whether the District Court was correct in its procedural ruling." *Id.* And, as this Court held in *Slack*, both showings are mandatory. "Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal." *Id.* The statute also provides that the court must specify the issues that are deemed to satisfy the required showing.

Despite the statutory prerequisite and this Court's unambiguous language in *Slack*, the Second Circuit exercised jurisdiction in this case to review the timeliness issue, vacating the district court's dismissal, without there ever having been a

finding that petitioner satisfied the requirement of a substantial showing of the denial of a constitutional right. The district court made no such finding, as it denied a certificate of appealability entirely. And the Second Circuit panel considering the certificate of appealability made a finding only as to the procedural timeliness issue. Moreover, when the state argued to the panel deciding the appeal that the statutory jurisdictional requirement had never been met, the Second Circuit neither suggested that such a finding had been made, explicitly or implicitly, nor did it make the required finding itself.

In the absence of any finding by any court regarding any showing of the denial of a constitutional right, the Second Circuit could not entertain the appeal. Nevertheless, that court vacated the district court's dismissal of the petition, pointedly ignoring both the statute's unambiguous requirement and this Court's mandate in *Slack*. This exercise of jurisdiction in clear contravention of the prerequisites for entertaining an appeal would be reason alone to grant certiorari and summarily reverse the decision of the Second Circuit.

But this issue has much more far-reaching effects than this case alone. In fact, it is common practice for courts in the Second Circuit to grant certificates of appealability on timeliness issues without those courts ever considering *Slack*'s second prong. *See, e.g., Bond v. Walsh*, 2002 U.S. Dist. Lexis 4826 (E.D.N.Y. February 12, 2002) (district court grants certificate of appealability on timeliness issue alone without considering constitutional showing), *dismissal vacated*, 53 Fed. Appx. 162 (2d Cir. 2002) (court exercised jurisdiction over appeal by reviewing timeliness issue and vacating dismissal); *Baldayaque v. United States*, 2002 U.S. Dist. Lexis 17652 (D. Conn. 2002) (district court issued certificate of appealibility on timeliness issue only, without considering necessity of second showing), *dismissal vacated*, 338 F.3d 145 (2d Cir. 2003)(court exercised

jurisdiction by disagreeing with timeliness determination and vacating dismissal); *Harrison v. Artuz*, 105 F.Supp. 2d 101 (ENDY 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. App. 332 (2d Cir. 2002) (exercising jurisdiction over appeal by agreeing with timeliness determination and affirming district court judgment); *see also Brigian v. Artuz*, 37 Fed. Appx. 559 (2002) (district court granted certificate considering timeliness issue only; Second Circuit affirmed on appeal).

Nor is this practice confined to the Second Circuit. Other circuit courts of appeals also appear to exercise jurisdiction frequently in the absence of the requisite showing. *Walker v. Warden*, 125 Fed. Appx. 568 (5th Cir. 2005) (specifically noting that it was not deciding whether substantial showing requirement had been met, but nevertheless granting COA, vacating and remanding on timeliness issue); *Franklin v. Dretke*, 106 Fed Appx 926 (5th Cir. 2004) (finding error on timeliness grounds only, granting COA, and vacating); *Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) (certificate of appealabililty on timeliness issue only, no finding regarding merits; affirmed on timeliness issue); *Walker v. Crosby*, 341 F.3d 1240, 1242 (11th Cir. 2003) (same, but reversed on timeliness issue); *Wampler v. Mills*, 60 Fed. Appx. 594 (6th Cir. 2003) (same).

By contrast, other circuits have adopted the correct practice in determining jurisdiction on these appeals from dismissals on timeliness grounds. *Edgington v. Hinsely*, 115 Fed. Appx. 879 (7th Cir. 2004) (COA originally granted on timeliness issue vacated for lack of substantial showing of denial of constitutional right); *United States v. Ponds*, 111 Fed. Appx. 689 (4th Cir 2004) (finding district court erred in timeliness determination, but denying COA because no showing of denial of constitutional right); *Kirkland v. Clark*, 2000 U.S. App. Lexis 33662 (4th Cir. 2000)(denying COA despite finding that district

court wrong on timeliness issue, because petitioner failed to make substantial showing on constitutional issue); *Adams v. LeMaster*, 223 F.3d 1177, 1179-80 (10th Cir. 2000) (noting correct standard and reviewing record to determine whether valid constitutional claim had been stated). This not only belies any claim that adherence to the statute is not feasible, it demonstrates that certiorari should be granted to determine which of the conflicting practices is correct.

Indeed, timely resolution of this issue is critical no matter what this Court eventually decides. If, as *Slack* states, a showing regarding the merits is necessary to appeal a timeliness issue, then many petitioners are obtaining review of their claims in instances where it is not appropriate; they may, for example, have even failed to allege any constitutional claim at all in their petitions, much less a valid constitutional claim. If, on the other hand, no showing is required, then petitioners in the circuits requiring such a showing are being deprived of appeals on timeliness questions when appeals should be granted because the timeliness issues are debatable. Only this Court has the power to bring uniformity to the circuit court's exercise of appellate jurisdiction over timeliness dismissals, and only this Court can ensure that those litigants deserving of review, and only those litigants, obtain it.

Moreover, the far-reaching effects of a decision on this issue can be seen on another scale as well. A ruling on the jurisdictional requirements for an appeal under section 2253 would not only affect virtually every case in which a district court dismisses the habeas corpus petition of a state prisoner on timeliness grounds, it would also apply to timeliness dismissals of virtually all federal prisoners seeking relief under section 2255, which is also subject to section 2253's jurisdictional requirements. Because so many cases fall into these categories,

this Court should grant review to ensure that all of these applications are decided using the correct standard.

Nor can respondent Cain plausibly maintain, as he did in the lower court, that the issue raised here has a faulty premise because the Second Circuit panel granting the certificate of appealability in this case must have implicitly held that there had been a substantial showing of the denial of a constitutional right. This argument amounts to nothing more than speculation. There is not a shred of evidence in the decision of the panel suggesting any such consideration, any more than there is in the district court decision. Moreover, had the panel made such a finding, it would have been required by the statute to set forth what that issue was. *See* 28 U.S.C. § 2253(c)(3). In the absence of any suggestion that such a merits determination was made in granting the certificate of appealability, it must be presumed that the panel did not find any substantial issue.

More important, when the Second Circuit was expressly confronted with the jurisdictional issue in this case, that court did not suggest that there was, or must have been, an implicit finding on this issue in granting the COA. Similarly, the court did not take respondent up on his suggestion that the court find such a constitutional issue when deciding the appeal, so at to validate the grant of the certificate. Indeed, the requisite finding has simply never been made, not in the district court, not by the panel considering the certificate of appealability, and not by the panel deciding the appeal.

This Court, then, should grant review of this issue for several reasons: because the Second Circuit exercised jurisdiction over the appeal without any authority to do so and in direct contravention of the statute and this Court's unambiguous precedent; because the Second Circuit and other circuit courts routinely exercise jurisdiction to hear appeals on

timeliness questions without the authority to do so; and because only this Court can reconcile the varying practices of the circuit courts and ensure that appeals from timeliness dismissals are taken only when authorized. Both the jurisdictional nature of the issue and the widespread effect that a decision would have compel review in this case.

II. The Circuit Courts Are Divided Over the Important Issue of whether the Federal Mailbox Rule of *Houston v. Lack*, 487 U.S. 266 (1988), Should Be Extended to State Court Filings for the Purposes of Determining Tolling under the Habeas Corpus Statute of Limitations.

The second issue presented by this case is equally compelling, both because it has openly divided the circuit courts of appeals and because it allows this Court to address the unwarranted expansion of a federal doctrine that it has not addressed in seventeen years. As the Second Circuit itself noted in deciding the companion matter to this case, *Fernandez v. Artuz*, 402 F.3d at 114-15, there is a split of authority over whether the statutory tolling period for state post-conviction applications begins when the state petition is deemed filed under state law or, applying the federal "mailbox rule," when the state petition is handed to prison authorities. This Court should grant review in this case to resolve this conflict, and to address whether the mailbox rule – conceived by this Court under much more exigent circumstances than those present here – can legitimately be extended to apply to filings over which the state has unquestioned authority.

At least five federal circuit courts of appeals have addressed whether the federal mailbox rule applies to toll the statute of limitations for state post-conviction applications or whether state filing rules apply. The Tenth Circuit, for example, held in *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), that

state rules should govern the determination of when a state application will be deemed properly filed. The court noted that it had applied the federal mailbox rule to many different types of federal filings, but refused to extend it to state applications due to the "'high degree of respect' and 'deference' the [AEDPA] affords state courts." *Id.* at 1181. The court also relied on this Court's decision in *Artuz v. Bennett*, 531 U.S. 4, interpreting the very same provision of the AEDPA. In that case, this Court defined filing as occurring when a document is "delivered to, and accepted by, the appropriate court officer for placement into the official record," and "proper" filing as occurring when delivery and acceptance are in compliance with "the applicable state laws and rules governing filing." *Id.* at 8. In addition, the Tenth Circuit held that it did not matter that the state in that case imposed no time limits on the particular state motion in issue, noting that the interpretation of the statute must apply uniformly, and that, in fact, in the absence of any state filing deadline, the compelling circumstances supporting the mailbox rule – the imminent preclusion of review of the state-court motion – did not exist. 223 F.3d at 1181 n.3 , 1183 Since *LeMaster* was decided, the Tenth Circuit has repeatedly adhered to that rule. *See Garcia v. Shanks*, 351 F.3d 468, 472 (10th Cir. 2003) (adhering to same rule post-*Bennett*); *Burger v. Scott*, 317 F.3d 1133, 1140-41 (10th Cir. 2003).

In *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000), the Fifth Circuit came to the same conclusion. Noting that it had previously applied the mailbox rule to many federal filing statutes, the court nevertheless found that the extension of the rule advocated by the petitioner was not warranted. The court held that comity considerations prevented the court from superimposing the federal mailbox rule on the tolling provision, and decided that the concerns identified in *Houston* could be addressed by equitable tolling.

And in *Vroman v. Brigano*, 346 F.3d 598 (6th Cir. 2003), the Sixth Circuit followed suit. In that case, the court rejected application of the federal mailbox rule to a state post-conviction application, finding that it did not sufficiently toll the limitations period to render the petition timely. The Court noted that state filing rules judged filing by receipt and that federal courts were bound to accept state-court determinations in that respect.

By contrast, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the Ninth Circuit, in interpreting the tolling provision, stated, "we [have] squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions." The Court, however, did not address how its view squared with this Court's decision in *Bennett*, or how "filing" could be determined by federal law while "proper filing" would be determined by state law.

And the Second Circuit in this case and *Fernandez*, the companion case, applied the federal mailbox rule to determine when state applications were filed. The court first noted that it had extended *Houston*'s mailbox rule to many different types of federal filings. 402 F.3d at 113-14. The court then reasoned that because the state imposed no time limits on the filing of state petitions, "the date of filing does not render it proper or improper." *Id.* at 116. The court also held that, for the same reason, the New York courts would never decide whether the prison mailbox rule would apply to these prisoners. The court also reasoned that application of the mailbox rule to the tolling provision could never implicate principles of comity because the state proceedings were already concluded by the time the federal proceedings commenced. *Id.* at 115 n.3.

The Second Circuit's decisions in *Fernandez* and this case placed that court squarely in conflict with the other circuit

courts. The Fifth Circuit similarly acknowledged that it had extended the mailbox rule to many different types of federal filings, but held that the extension to state court proceedings was unwarranted. The Tenth Circuit also considered a state application as to which no time limit existed, but still chose to follow state filing rules. That court also felt perfectly capable of discerning a state filing rule in the absence of a specific state time limit, in contrast to the Second Circuit's purported inability to make such a determination absent a state time bar. And the Tenth Circuit, like the Fifth and the Sixth Circuits, ruled that comity concerns were paramount even though the state proceedings had been concluded.

Not only should this Court grant review to resolve this direct and openly acknowledged conflict, it should do so because this case presents an opportunity to address the expansion of the *Houston* rule so far beyond the reasons for its inception. In *Houston*, this Court addressed a situation in which the petitioner had been denied his right to appeal because, although he had given his notice of appeal to prison authorities within the short 30-day time period required for such filings under federal law, it had not been received by the clerk until one day after the 30-day period. Absent a timely filing of the notice of appeal, the Court of Appeals was deprived of jurisdiction to hear the appeal at all. Because the petitioner had given the notice of appeal to prison authorities with several days to spare, and he had no further control over its delivery, this Court, interpreting the Federal Rules of Appellate Procedure, held that the notice of appeal should be deemed filed when given to prison authorities.

These harsh effects, jurisdictionally ending the petitioner's case forever for failure to comply with a short deadline, are not repeated in this context. First, petitioners have a full year to comply with the statute of limitations, and a

routine delay of a few days that can easily be anticipated, much like other routine prison delays incorporated within the one-year limitations period, will rarely have the impact that the four-day delay had in *Houston*. Second, for any truly significant delays caused by prison authorities, an additional mechanism exists in this context that was not available in *Houston*: equitable tolling. This mechanism is designed specifically for unusual delays occasioned by the state that operate to deprive a petitioner of his ability to satisfy the statute of limitations.

Thus, the concerns that were so compelling in the *Houston* context as to cause the court to devise a special rule of equity do not exist in the context of tolling for state post-conviction applications. Ordinary delays in the handling of mail by prison authorities require no special consideration, and the federal courts have ample means to address excessive delays that are truly caused by correction officials.

By contrast, there are considerable costs imposed when the mailbox rule is adopted. Indeed, time has proven that application of the mailbox rule is a factually complex matter that often does not admit of easy resolution, particularly in this context. In many cases, petitioners file their state post-conviction applications with no representation concerning when the filings were given to prison authorities. Many applications are undated, and many others back-dated. And, when asked directly, many prisoners eagerly misrepresent the relevant facts. Indeed, petitioner here claimed that his application was given to prison authorities on July 10, 2001, when in fact he could not have filed it until fully four months later.[2] *See also Edgar Velez*

[2] Even petitioner's affidavit of service – something frequently neglected by state prisoners – did not accurately reflect the date the *coram nobis* petition was given to prison authorities. The affidavit of service reflected that documents were forwarded to the District

v. Walker, No. 02-CV-1732 (E.D.N.Y. February 5, 2003), *adopted*, No. 02-CV-1731 (E.D.N.Y. March 27, 2003) (petitioner misrepresented date he handed petition to prison authorities by seven months); *Darryl Gadson v. M. McGinnis*, 99-CV-3624 (E.D.N.Y. April 22, 2002) (declining to accept petitioner's representation that he had filed habeas petition earlier but it had been returned). Nor do prison authorities in New York create logs of every piece of mail that leaves the prison. Indeed, New York prisons are under an obligation to deposit mail with the post office within one day of when it is collected, *see* New York Department of Corrections Directive No. 4442, dated May 8, 2002, Part III (F), and could not possibly accurately log every piece of mail in this short time span. Moreover, prisoners often send so many filings and letters to the courts that any tracking system could not reliably indicate what motion or paper was sent to the state court on a particular day. All of these factors contribute to factual disputes that are often difficult to resolve definitively, and force courts into the position of having to simply assume that a petition is given to prison authorities on the date it is signed, *see Washington v. United States*, 243 F.3d 1299, 1301(11th Cir. 2001); *Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001); *Rhodes v. Senkowski*, 82 F.Supp.2d 160, 165 (S.D.N.Y. 2000). This is a routinely incorrect conclusion, as this case itself illustrates.

Furthermore, this difficulty in determining the date that a document is given to prison authorities would be multiplied many times under the Second and Ninth Circuit's rule. Prisoners routinely file numerous state post-conviction applications, often extending over a period of years. Each of

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Attorney's Office on December 7, 2001, while petitioner's cover letter to the court filing the *coram nobis* petition is dated December 10, 2001.

these would require either a factual investigation of the evidence concerning the date the document was delivered to prison authorities or an abdication to prisoners' routinely false or mistaken representations. The process is all the more difficult because the factual inquiry must reach backwards over a period of several years. Thus, unlike when a prisoner files a habeas petition in federal court, and the state can promptly investigate the date it was handed to prison authorities, prior state petitions filed years before require investigations that, if they are possible at all, require sifting through volumes of stale records.

This process allows all too readily not only multiple additional delays, but also substantial inaccuracies, to invade the process. The ability to determine confidently and definitively precisely what periods are subject to tolling is virtually lost, and the uncertainty cannot help but undermine the finality that the statute of limitations otherwise advances. Moreover, the rule advocated by the Second and Ninth circuits allows fraud and misrepresentation on the part of prisoners to play too regular a role in the determination of tolling. And the ability on the part of prisoners to backdate their filings, usually with impunity, undermines the seriousness with which they take the strictures of the statute.

By contrast, receipt can almost always be quickly established. Almost all courts, and certainly all in New York, stamp legal mail when it is received. This stamp is immediately evident, and where any dispute exists, that dispute can be promptly and definitively resolved. Moreover, all prisoners need to do under New York law to obtain a definitive date on which a particular document is deemed filed is to include a stamped self-addressed post-card with the filing in order to obtain a receipt. *See* 22 N.Y.C.R.R. § 600.2(a)(6). Thus, in the place of lengthy investigations based on sparse and ill-kept stale records are quickly resolved disputes. This certainty advances

both the ease of application of the statute of limitations and the finality that the statute engenders.

But the Second Circuit considered none of these subtleties. It did not weigh the need for the rule against the costs, and instead simply assumed that the mailbox rule must presumptively be applied to all prisoners in the absence of a compelling independent reason precluding application of the rule. Because this Court has not addressed the *Houston* rationale in seventeen years, has not stated when the extension of the *Houston* rationale is appropriate or what circumstances must be weighed, and has certainly never countenanced the rule's application to state-court filings in any sense, it should now grant review to consider those questions.

Moreover, even assuming, as did the Second Circuit, that the mailbox rule should presumptively be applied to all prisoner filings of any nature, the Second Circuit's reasoning was still not adequate to resolve the important issue presented. The Second Circuit rested its adoption of the mailbox rule on the fact that the New York state petitions had no filing deadline, that no state rule concerning the time when these petitions were deemed filed was discernible, and that no true comity interest could be implicated because the state proceedings had concluded. This reasoning is flawed for many reasons. First, even though the particular post-conviction applications at issue were not subject to time-bars, many post-conviction applications are in fact time-limited, both inside and outside New York State. In New York, for example, time limitations exist for filing applications for leave to appeal post-conviction motions, petitions for writs of prohibition or mandamus under Article 78 of the Civil Practice Law and Rules, and applications to file late notices of appeal. Thus, wholesale adoption of the mailbox rule cannot be justified on the ground that a few applications do not

involve time limitations. This is, in fact, precisely what the Tenth Circuit observed in *LeMaster*.

Second, as the Tenth Circuit also observed in *LeMaster*, the absence of a state filing deadline, if anything, *undermines* the *Houston* rationale. The state prisoner need not fear imminent preclusion if his state petition is late, and can make whatever adjustment is necessary before filing his federal petition. Thus, the exigency present in *Houston* simply does not exist.

Third, the fact that the state petitions were not subject to a time bar may be significant to determine whether the state application was "properly" filed, and therefore whether it would receive any tolling, but it does not determine *when* an otherwise "proper" petition should be deemed filed. Put another way, whether a petition is ultimately determined to be "properly filed" in a given case does not determine when filing should be deemed to commence. After all, as this Court recently held in *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005), if the petition exceeded a state time limitation and it was therefore not properly filed, no tolling would be afforded; thus, the question of the date tolling commences would not arise at all. Accordingly, contrary to the Second Circuit's assumption, the state's failure to rely on a time bar is simply not dispositive of the question before the court.

Fourth, the Second Circuit contradicted itself when it suggested that the state has no rule determining the time of filing. Indeed, as the Second Circuit itself acknowledged in *Fernandez*, state rules specify that a motion "shall be considered filed only upon receipt." N.Y.C.R.R. § 600.2(a)(6). And the Court rules of the New York State Appellate Division, Second Department, where Cain's state applications were filed, recite that all "motions, affirmations, and other papers will be deemed filed in this court only as of the time they are actually received

by the clerk." N.Y.C.R.R. § 670.2(d). These are more than sufficient expressions of the state's filing rules.

Fifth, to the extent that the Second Circuit is suggesting that it would apply the mailbox rule solely for applications that do not implicate a time bar and would apply state rules for those that do, the court fails to explain how Congress could have intended for the same word, "filing," to have two such different meanings simultaneously: a federal one in the first context and a state one in the second. Certainly, nothing in the text of the statute suggests such dual meanings, and the court does not explain why the very same language in the same statute should be given such opposite interpretations. *See Barnhart v. Walton*, 535 U.S. 212 (2002) (requiring explanation of "why we should interpret the same statutory words differently in closely related contexts").

Finally, the Second Circuit is wrong in assuming that no comity concerns exist because the state proceedings have been concluded. When a federal court undoes an otherwise final state conviction, respect for state processes is necessarily undermined. This is so even if the state itself leaves open the possibility that a defendant might be able to convince the state court to alter the conviction. Federal review is intrusive whether the state wishes to afford a petitioner further state review or not.

Furthermore, the use of a federal mailbox rule for state filings under the tolling provision would also offend comity in a manner that directly prejudices the state in more concrete ways. When a state declines to adopt the mailbox rule, as New York has done and as any state is perfectly free to do, it does not adopt procedures necessary to deal with the unique problems presented by the mailbox rule, as have the federal courts. The federal courts have, for example, adopted Federal Rule of

Appellate Procedure 4(c), which requires prisoners to file an affidavit regarding the date they handed their papers to prison authorities. This at least minimally provides some assurance regarding the date filings are given to prison authorities, although even then prisoners serving lengthy sentences are often not deterred from lying. States like New York that do not follow the mailbox rule have no such special provisions, of course. These states have few defenses against rampant backdating or other falsities perpetrated by petitioners. Indeed, the states cannot even defend against what would be the equally pervasive problem of faulty memories of prisoners trying to guess, months or years after the fact, the dates on which they handed their prior state applications to prison authorities. Moreover, requiring non-mailbox rule states to adopt procedures to address the unique problems presented by the mailbox rule would indeed offend fundamental principles of comity. Under any understanding of that principle, federal courts would be precluded from requiring states to enact state rules that are consistent with, and deal with the adverse affects of, a rule the states have expressly and justifiably chosen not to adopt with regard to their own state proceedings.

This Court, then, should grant review to resolve the circuit split on this issue, to determine the extent to which, and the circumstances under which, the federal mailbox rule can be extended beyond the circumstances giving rise to its inception, and, more specifically, to decide whether such an extension is warranted here, where substantial state interests are at stake.

CONCLUSION

This Court should grant certiorari to determine whether the circuit courts of appeals are correctly exercising jurisdiction to review appeals from dismissals on statute of limitations grounds and to determine whether, or under what circumstances, the federal mailbox rule can be extended beyond the circumstances of its inception to the filing of state court post-conviction applications.

Respectfully submitted,

RICHARD A. BROWN
District Attorney, Queens County

JOHN M. CASTELLANO*
Assistant District Attorney

**Counsel of Record for the Petitioner*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ALMEIN CAIN,

Petitioner,

MEMORANDUM AND ORDER

-against-

Case No. 02-CV-3956 (FB)

VICTOR T. HERBERT, Superintendent, Fishkill Correctional Facility,

Respondent.

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APPEARANCES:

For the Petitioner:
ALMEIN CAIN, *pro se*
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

For the Respondent:
RICHARD A. BROWN, ESQ.
District Attorney, Queens County
By: JENNIFER F. FRIEDMAN, ESQ.
Assistant District Attorney
125-01 Queens Boulevard
Kew Gardens, NY 11415

BLOCK, District Judge:

On July 3, 2002, Almein Cain ("Cain") filed this petition, *pro se*, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction in Queens County. The Court ordered Cain to show cause why the petition should not be dismissed as time- barred. *See* Memorandum and Order, No. 02-CV-3956, August 30, 2002. In particular, the Court required the date Cain had filed a motion for error *coram nobis* in order to ascertain whether the petition was timely filed. *See id.* at 3. Cain submitted an affirmation on September 22, 2002, simply stating that he filed the motion on July 10, 2001. *See* Pet. Affirmation, at 4. On this basis, Magistrate Bloom concluded his *habeas* petition was timely, and she issued an order that the petition be served on respondent. *See* Order, No. 02-CV-3956, December 27, 2002.

Respondent thereafter moved to dismiss the petition as time-barred, and submitted documentation in support of the motion that demonstrated that Cain's motion for error *coram nobis* was filed on December 17, 2001, not July 10, 2001. *See* Resp. Reply, Ex. 1-3. Using December 17, 2001 as the filing date in the calculus set forth in the Court's August 27, 2002 Memorandum and Order, Cain's petition would be untimely. *See* Memorandum and Order, No. 02-CV-3956, at 3-4.

The statute of limitations for filing a *habeas* petition is tolled for the "time during which a *properly filed application* for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added); *see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) ("[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."). State law controls the question of when a post-conviction motion is considered properly filed. *See Moore v. Gibson*, 250 F.3d 1295, 1297 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001); *Rosario v. Bennett*, No. 01-CV-7142, 2002 WL 31852827, at *15

(S.D.N.Y. Dec. 20, 2002). In New York, the date of filing is the date the motion is received by the clerk of the court; it is not the date that the prisoner gives the document to corrections authorities for filing. *See* N.Y.C.P.L. 304, *Grant v. Senkowski*, 95 N.Y.2d 605, 608 (2001) (rejecting federal "prisoner mailbox rule" in which "the term 'filing' would be redefined to mean the delivery of a notice of petition or order to show cause by a pro se prisoner to prison authorities for forwarding to the appropriate court"). Here, Cain's motion for error *coram nobis* was properly filed on December 17, 2001, the date it was received by the clerk of the Second Department. *See* Resp. Reply, Ex. 3 (Notice of Motion for Writ of Error Coram Nobis) (stamped "Received" in Second Department on December 17, 2003).

The petition should be deemed untimely, unless Cain can demonstrate that the statute of limitations period should be equitably tolled because (i) "extraordinary circumstances prevented him from filing his petition on time," and (ii) he "acted with reasonable diligence throughout the period he seeks to toll." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (*per curiam*) (citing *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Dept 1996)), *cert. denied*, 531 U.S. 840 (2000); *see also Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (determining confiscation of legal papers sufficient to establish potential basis for equitable tolling). Although it appears that Cain prepared his motion in July 2001, *see* Resp. Reply Ex. 1 (motion, with typed date July 10, 2001), he offers no explanation for the time lag between the date he prepared his papers and the date they were filed, other than to claim that "the Respondent seems to be manufacturing a date of December 17, 2001." Pet. Traverse, at 4. The documents submitted by respondent belie Cain's ignorance of the date the motion was actually filed: Cain's signature on his moving papers is notarized

on December 7, 2001. *See* Resp. Reply, Ex. 1-2. This is not a circumstance that warrants a finding of equitable tolling.

Since Cain's motion for error *coram nobis* was filed on December 17, 2001, his *habeas* is untimely. The petition also would be untimely even if the Court computed the tolling of the statute from December 7, 2001, the date Cain's signature was notarized. Therefore, the petition is dismissed. *See* 28 U.S.C. § 2244(d).

SO ORDERED.

Dated: Brooklyn, New York
April 7, 2003

E.D.N.Y.
02-CV-3956
Block, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 10th day of November, two thousand three,

Present:

Hon. Richard J. Cardamone,
Hon. Sonia Sotomayor,
Hon. Robert A. Katzmann,
Circuit Judges.

Almein Cain,

Petitioner-Appellant,

v. 03-2319

Vincent T. Herbert,

Respondent-Appellee.

Appellant, *pro se* and *in forma pauperis*, moves for a certificate of appealability from the district court's order dismissing his 28 U.S.C. § 2254 petition as timed barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Upon due consideration, it is ORDERED that the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations. Counsel will be assigned pursuant to the Criminal Justice Act, after which time a scheduling order will be issued. This case will be heard in tandem with *Artuz v. Fernandez*, No. 03-2541 in which this Court is considering the same issue. If Fernandez moves for appointment of counsel, and a panel grants that request, the same counsel should be appointed in both *Cain v. Herbert*, No. 03-2319 and *Artuz v. Fernandez*, No. 03-2541.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Decided: March 17, 2005)

Docket No. 03-2319

ALMEIN CAIN,

Petitioner-Appellant,

v.

VINCENT T. HERBERT, Superintendent,

Respondent-Appellee.

Before HON. DENNIS JACOBS, HON. SONIA SOTOMAYOR, HON. PETER W. HALL, Circuit Judges

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **VACATED** and **REMANDED** for proceedings consistent with this order and this Court's opinion issued today in Fernandez v. Artuz, 03-2541.

Almein Cain appeals from a judgment of the United States District Court for the Eastern District of New York (Block, J.), dismissing as untimely Cain's petition for a writ of habeas corpus. We assume familiarity as to the facts, the procedural context, and the specification of appellate issues.

This case turns upon whether Cain's state coram nobis petition is deemed "properly filed" (within the meaning of 28 U.S.C. § 2244(d)) on the date it was delivered to prison authorities for mailing, or on the date it was received by the state court. For the reasons stated in our opinion issued today in Fernandez v. Artuz, 03-2541, we find that the prison mailbox rule applies. It is not altogether clear from the present record what the filing date is when the prison mailbox rule is applied, as Cain's application for the state writ consisted of documents bearing three different dates.

The record is clear, however, with respect to the date upon which Cain filed his federal habeas petition. This Court also applies the prison mailbox rule to fix the date on which a federal habeas petition is filed. Adeline v. Stinson, 206 F.3d 249, 251 n.1 (2d Cir. 2000) (per curiam" ("When a prisoner is proceeding pro se . . . federal courts generally consider his or her petition for habeas corpus to have been filed as of the date it was given to prison officials for forwarding to the court clerk."). Cain's federal habeas petition was therefore filed on June 26, 2002 (the date Cain delivered his petition to prison officials) rather than on July 3, 2002 (the date the petition was received by the district court).

The judgment of the district court is hereby **VACATED** and **REMANDED** for proceedings consistent with this order and this Court's opinion issued today in Fernandez v. Artuz, 03-2541.

(2)

No. 04-1726

Supreme Court, U.S.
FILED
AUG 24 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

J.L. POTTENGER, JR.
Counsel of Record
BRETT DIGNAM
THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1) Whether the Second Circuit properly followed *Slack v. McDaniel* in exercising jurisdiction over an appeal from the dismissal of a habeas corpus petition on timeliness grounds only after the petitioner had made a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2)?

2) Whether a federal court, when calculating tolling time under 28 U.S.C. § 2244(d)(2), should apply the federal prison mailbox rule to a *pro se* prisoner's "properly filed" application for state relief where state law poses no deadline for filing such applications?

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COUNTERSTATEMENT OF THE CASE

Respondent Almein Cain is currently incarcerated in Attica Correctional Facility. He alleges that he did not commit the crime for which he was convicted, and that the conviction is the result of state procedures that violated his constitutional rights.

According to the facts cited in Cain's federal petition for a writ of habeas corpus and application for a Certificate of Appealability, on November 15, 1995, four people were shot to death during a botched holdup of a grocery store in Queens County, New York. *See* C.A. 7.[1] The only surviving victim of the crime, Eric Caraballo, reviewed thousands of mugshots in the hospital and did not at that time identify Cain as one of the perpetrators. *Id.* at 115. When asked in front of the grand jury to describe the gunman, Caraballo testified: "He was black, tall, *that's the only thing I could see* because from there I was taken to the back." *Id.* at 10 (emphasis added).

Approximately one month after the shootings, however, a man named Amaury Rosario gave a confession to the police that said he was involved in the crime, and which also implicated Respondent Almein Cain as a fellow perpetrator. C.A. 10. But Rosario later testified, first at a suppression hearing and then at his own trial, that his confession was unlawfully coerced through physical beatings and threats, and that he in fact had nothing to do with the crime. *Id.* at 9, 111. Rosario subsequently was acquitted of all charges. *Id.* at 21 n.12.

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[1] Citations to "C.A." refer to the Appendix that Respondent Cain submitted to the Second Circuit with his principal appellate brief.

It was not until after Rosario's "confession" that Cain was arrested, based on the fact that Caraballo was suddenly able to identify Cain as one of the perpetrators. C.A. 9-10. The police, who were told by Caraballo that the gunman was between 18 and 21 years old, heavy-set and between 5'10" and 6' tall, placed Cain in a lineup. At 25 years old, 6'2" and 250 pounds, he was the only lineup participant who even came close to matching that physical description. *Id.* at 11. The five others in the lineup were all over 30 years old, and, as the arresting officer acknowledged, none of them matched Cain's weight or height. *Id.* In addition, when Cain attempted to challenge the lineup at a *Wade* hearing, the state produced a photograph of the lineup that depicted clearly only Cain and two others; the remaining three participants were "indescribable or unobservable." *Id.* at 10-11.

At Cain's 1997 trial, Caraballo named Cain as the gunman, and testified that he could see Cain's face, which he would "never forget" – this despite Caraballo's earlier grand jury testimony to the contrary. C.A. 14. Caraballo also indicated, however, that he may have been told what to look for at the lineup, testifying that "I [sic] not looking for the mustache because *I know the guy I have to pick out. . . .*" *Id.* at 16 n.8 (emphasis added). The jury convicted Cain of eight counts of Murder in the Second Degree, and on November 24, 1997, Cain was sentenced to an indeterminate term of incarceration of 130 years to life. *Id.* at 21.

On December 2, 1997, Cain filed a timely notice of appeal to the New York State Appellate Division, Second Department ("Second Department"). C.A. 41. On April 10, 2000, the Second Department affirmed the judgment of conviction. *People v. Cain*, 708 N.Y.S.2d 413 (N.Y. App. Div. 2000). On or about April 27, 2000, Cain sought leave to appeal to the New York Court of Appeals. C.A. at 51. That

application was denied without published opinion on June 20, 2000. *People v. Cain*, 735 N.E.2d 419 (N.Y. 2000). Cain did not seek a writ of certiorari from this Court.

State Collateral Challenges

On August 24, 2000, Cain filed a *pro se* motion, pursuant to section 440.10 of the New York Criminal Procedure Law, seeking to vacate his judgment of conviction, arguing that the evidence that led to his conviction consisted of the fruits of the confession illegally obtained from Rosario. C.A. 24-26. On October 30, 2000, the Supreme Court of New York, Queens County, denied the motion. *Id.* at 52. On November 28, 2000, Cain sought permission to appeal the denial. *Id.* The Second Department denied Cain's request on February 5, 2001. *Id.* at 53.

On Friday, December 7, 2001, Cain completed an application to the Second Department for a writ of error *coram nobis*, alleging ineffective assistance of counsel on his direct appeal. *See* C.A. 25, 96. Cain argued that his appellate counsel, among other omissions, failed to argue that Rosario's statement to the police implicating Cain was coerced. *Id.* at 53. Cain submitted the *coram nobis* application to prison officials for mailing on Monday, December 10, 2001.

The Second Department, however, did not stamp Cain's *coram nobis* application as "received" until December 17, 2001, seven days after it was submitted to prison authorities. *See* C.A. 98. The record contains no explanation for this delay. On April 29, 2002, the Second Department denied Cain's *coram nobis* application. *People v. Cain*, 708 N.Y.S.2d 413 (N.Y. App. Div. 2002).

The Federal Petition for a Writ of Habeas Corpus

Less than two months later, on June 26, 2002, Cain submitted to prison authorities for mailing his federal habeas petition, alleging violations of the Fourth, Sixth, and Fourteenth Amendments to the U.S. Constitution. C.A. 6-31, 46. Specifically, the petition alleged that the lineup was unduly suggestive, that Cain's appellate counsel was unconstitutionally ineffective, and that his conviction was the result of an unlawfully obtained confession. *Id.* at 6-31. The petition was not marked as received by the clerk of the Eastern District of New York until July 3, 2002. *Id.* at 6.

The Superintendent of Attica Correctional Facility, who is the petitioner before this Court, argued to the district court that Cain's habeas petition should be dismissed as time-barred under the one-year statute of limitations of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The Superintendent argued that the "prison mailbox rule," under which the papers of *pro se* prisoners are considered filed at the moment of their delivery to prison officials for mailing, should not be applied to Cain's postconviction filings. The district court agreed, ruling that Cain's *coram nobis* application had been "filed" in the Second Department on the date it was marked as received by the court, December 17, 2001; that Cain's federal habeas petition was "filed" on July 3, 2002, the date it was marked as received by the federal court; and therefore that Cain's federal habeas was untimely. Pet. at 2a-4a.[2] (The district court did not specify how many days past AEDPA's one-year deadline the petition had

[2] Citations to "Pet." refer to the Petition for a Writ of Certiorari filed by Superintendent Herbert and its accompanying appendix.

been filed, but the court's rulings suggest that the petition would have been untimely by fourteen days.) Had the district court applied the prison mailbox rule both to Cain's state *coram nobis* application and to his federal habeas petition, however, Cain's federal habeas would have been timely by one day.

The district court explained its decision not to apply the mailbox rule to Cain's state *coram nobis* application by asserting that "[s]tate law controls the question of when a postconviction motion is considered properly filed" and that "[i]n New York, the date of filing is the date that the motion is received by the clerk of the court; it is not the date that the prisoner gives the document to corrections authorities for filing." Pet. at 2a-3a. The district court did not explain its decision not to apply the mailbox rule to the filing of Cain's federal habeas petition itself – a decision that was directly contrary to the established law in the Second Circuit. *See Noble v. Kelly*, 246 F.3d 93, 97-98 (2d Cir.), *cert. denied*, 534 U.S. 886 (2001) (extending the prison mailbox rule to the filing of federal habeas petitions).

On May 6, 2003, Cain petitioned the district court for a Certificate of Appealability ("COA"), which the court denied. Cain then moved for a COA in the Second Circuit, which was granted on November 13, 2003. The Second Circuit's order states in relevant part: "Upon due consideration, it is ORDERED that the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations." Pet. at 6a.

On appeal, the Second Circuit decided this case in an unpublished summary order.[3] The order reiterated the

[3] *See* 2d Cir. R. 0.23 ("Since [summary orders] do not constitute formal opinions of the court and are unreported or not uniformly

(Continued on following page)

court's holding in *Noble* that the prison mailbox rule applies to the filing of federal habeas petitions and stated that Cain's federal habeas should therefore be deemed as having been filed on June 26, 2002. Pet. at 8a. The Second Circuit further ruled that, for the limited purpose of calculating AEDPA tolling time, the prison mailbox rule should also be applied to Cain's *coram nobis* application. *Id.* For this aspect of its ruling, the court referred to its published decision in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), *cert. pending*, Sup. Ct. Index No. 04-1540,[4] a case that was heard in tandem with Cain's and which also addressed whether a federal court in calculating AEDPA tolling time should apply the prison mailbox rule to state postconviction motions.

In *Fernandez*, the Second Circuit reasoned that application of the mailbox rule to state filings for the purpose of calculating AEDPA tolling time "is consonant with AEDPA's goals of 'furthering the principles of comity, finality, and federalism.'" 402 F.3d at 115 n.3, *quoting Williams v. Taylor*, 529 U.S. 420, 436 (2000). Applying the mailbox rule, the court stated, "grants the full statute of limitations for *pro se* prisoners attempting to reach the courts" and "evinces no disrespect for the competence of state courts, their procedures, or the stability of state verdicts." 402 F.3d at 115 n.3. The Second Circuit also noted that its result was consistent with this Court's ruling in *Artuz v. Bennett*, 531 U.S. 4 (2000), because the petitioner's *coram nobis* application was "properly filed"

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available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court").

[4] Counsel for Respondent Cain is also representing Respondent Fernandez in opposing the Superintendent of Green Haven Correctional Facility's petition for a writ of certiorari.

under state law and procedure. *Fernandez*, 402 F.3d at 114, 116. Because New York has no deadline for the filing of *coram nobis* applications, the issue of timeliness does not arise during the state's consideration of such an application. *Id.* at 116. Thus, noted the Second Circuit, there "is no and can be no real conflict between state law and federal law" in applying the mailbox rule to a New York *coram nobis* application when a federal court calculates AEDPA tolling time. *Id.*

REASONS FOR DENYING THE WRIT

I. The Second Circuit Properly Exercised Jurisdiction Over Respondent's Habeas Appeal, Consistent With This Court's Decisions In *Slack v. McDaniel* And *Miller-El v. Cockrell*, As Well As With The Holdings And Practices Of Other Circuits.

A certificate of appealability ["COA"] may issue under 28 U.S.C. § 2253(c)(2) only "if the applicant has made a substantial showing of the denial of a constitutional right." The statutory language places the onus on the applicant to make this showing, but an appellate court, when deciding whether to grant a COA, may make only a "threshold inquiry" into whether the necessary showing has been made. *Slack v. McDaniel*, 529 U.S. 473, 482, 485 (2000). The inquiry "requires an overview of the claims in the habeas petition and a general assessment of their merits," but "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court denies a habeas petition on procedural grounds without reaching the petition's

underlying constitutional claims, as happened in this case, a COA applicant must show that reasonable jurists would find it debatable both "whether the district court was correct in its procedural ruling" and "whether the petition states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484.

The Superintendent does not argue that Respondent Cain failed to meet the procedural component of this test, *see* Pet. at 12-17, as the district court's decision not to apply the mailbox rule to Cain's state *coram nobis* application when calculating the deadline for filing his federal petition was at the very least "debatable." The jurisdictional issue raised by the Superintendent is thus whether it was also debatable that Cain stated a valid claim of the denial of a constitutional right. To have done so, Cain must have shown that reasonable jurists "could conclude the [constitutional] issues presented are adequate to deserve encouragement to proceed further," by proving "something more than the absence of frivolity or the existence of mere good faith" on his part. *Miller-El*, 537 U.S. at 327, 328 (internal quotation marks omitted). Importantly, "a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337.

Cain easily satisfied this threshold inquiry. In his federal habeas petition and in his application for a COA, both of which were filed *pro se*, Cain alleged that his Fourth Amendment rights were violated in part because the direct fruits of an unlawful, coerced confession led to his conviction. *See* C.A. 26, 114-15, *citing Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (holding evidence

from such confessions to be excludable). As described above, Cain's arrest occurred only after he was identified in the confession of a codefendant, Amaury Rosario, who was acquitted of all charges after testifying about how police used force to coerce his confession. Before Rosario's "confession," the state's pivotal witness, Eric Caraballo, was unable to identify Cain as the gunman, and in front of the grand jury Caraballo testified only that the perpetrator was "black" and "tall" – adding "that's the only thing I could see." But at Cain's trial, which took place after Rosario's "confession," Caraballo testified that he did in fact see the gunman's face, which he would "never forget."

Cain also alleged that his due process rights were violated by the use of an unduly suggestive lineup. *See* C.A. 10-13. As noted above, during the initial police investigation, the gunman was described as being between 18 and 21 years old, heavy-set and between 5'10" and 6' tall. But Cain, at 25 years old, 250 pounds, and 6'2" tall, was the only lineup participant even close to matching that description; the other five were all at least 30 years old and, as the arresting officer acknowledged, none of them matched Cain's weight or height. In addition, the police department photograph of the lineup rendered any judicial review of the lineup difficult, because it clearly depicted only Cain and two other participants. (The other three were "indescribable or unobservable.") *Id.* at 10-11.

There can be no doubt that these claims of constitutional violations – as well as Cain's additional allegation of ineffective assistance of appellate counsel, in that the appointed counsel on his appeal did not raise the issue of the coerced confession – present non-frivolous issues that reasonable jurists could conclude are "adequate to deserve encouragement to proceed further." The Second Circuit therefore acted

properly in granting Cain a COA, which it did "[u]pon due consideration" following the district court's denial of Cain's habeas petition on timeliness grounds. *See* Pet. at 6a.

The Superintendent, however, distorts this Court's holding in *Slack* to argue that a COA cannot issue unless the district court or court of appeals makes a "finding" about the "merits" of a petitioner's constitutional claim. Pet. at 9, 11, 13, 16. But a COA determination is *not* a "merits determination." *Cf.* Pet. at 16. Rather, it is "a separate proceeding, one distinct from the underlying merits." *Miller-El*, 537 U.S. at 342. In fact, this Court has explicitly cautioned that an appellate court may *not* "first decid[e] the merits of an appeal, and then justify[] its denial of a COA based on its adjudication of the actual merits," because doing so would be "in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37. Contrary to the argument of the Superintendent, therefore, the Second Circuit was in no way required to make a special finding about the merits of Cain's constitutional claims; it was enough that Cain had made a clear showing in his habeas petition and in his COA that reasonable jurists could debate whether his constitutional rights were violated. To accept the Superintendent's argument would be to turn *Slack* and *Miller-El* upside down.[5]

The Superintendent is also plainly wrong to suggest that the Second Circuit "routinely" exercises jurisdiction over cases in which no substantial showing of the denial of a constitutional right has been made. *Cf.* Pet. at 16. On

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[5] If the Second Circuit is to be faulted in any way, it is that the court did not indicate in its November 10, 2003 order on which issues Cain had made a substantial showing, *see* Pet. at 6a, but such a minor omission surely does not merit Supreme Court review.

the contrary, in case after case, the Second Circuit has exercised great care to ensure that it does not grant COAs to applicants who fail *Slack*'s two-prong test. *See, e.g.*, *Morales v. Greiner*, 381 F.3d 47, 48 (2d Cir. 2004) (denying *pro se* COA motion for failure to make substantial showing); *United States v. Doe*, 365 F.3d 150, 154 (2d Cir.), *cert. denied*, 125 S.Ct. 449 (2004) (conditioning potential COA upon applicant making "substantial showing of the denial of [his] constitutional right [to counsel]"); *Jones v. Keane*, 329 F.3d 290, 297 (2d Cir.), *cert. denied*, 540 U.S. 1046 (2003) (liberally construing prisoner's appellate brief as COA motion, but denying COA for failure to make substantial showing); *Rudenko v. Costello*, 322 F.3d 168, 170 (2d Cir. 2003) (vacating consolidated COA granted to 16 unrelated petitioners because "each application will require particularized consideration" of "whether the applicant has sufficiently made 'a substantial showing of the denial of a constitutional right'"); *Eltayib v. United States*, 294 F.3d 397, 400 (2d Cir. 2002) (denying *pro se* COA motion for failure to show reasonable jurists would debate constitutional claims); *United States v. Outen*, 286 F.3d 622, 634, 641 (2d Cir. 2002) (liberally construing letter to court as COA request, but denying motion due to failure of merits brief to make substantial showing); *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (denying *pro se* COA motion for failure to satisfy *Slack*'s procedural component).

Given this considerable body of case law, it is telling that the Superintendent cites only two published cases for the sweeping proposition that it is "common practice" for courts in the Second Circuit to violate the *Slack* requirements.[6] *Cf.*

[6] The Superintendent also cites two unpublished cases in which district courts in the Second Circuit issued COAs on timeliness issues

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Pet. at 13-14, *citing Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) and *Harrison v. Artuz*, 105 F. Supp. 2d 101 (E.D.N.Y. 2000), *aff'd sub nom. Clark v. Barkley*, No. 00-2695, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) (unreported). Yet neither of these cases actually supports the Superintendent's conclusion. In *Baldayaque*, the district court granted a COA on a timeliness issue only after stating that the petitioner had "a constitutional claim of arguable merit" – thereby satisfying the *Slack* requirements. *See United States v. Baldayaque*, Nos. 3:95CR81, 3:99CV2272, 2002 WL 31094962 at *6 (D.Conn. Sept. 6, 2002) (unreported). And on appeal, the government explicitly asserted that the Second Circuit did indeed have appellate jurisdiction pursuant to the district court's issuance of a COA. *See* Brief for the United States of America at viii, *Baldayaque* (No. 02-2611), *available at*

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without also specifying on what constitutional issues the petitioners had made the requisite threshold showings. *See* Pet. 13-14, *citing Brigian v. Artuz*, No. 01-2389, 37 Fed. Appx. 559 (2d Cir. Jun. 18, 2002); *Bond v. Walsh*, No. 01-CV-0776, 2002 WL 460046 (E.D.N.Y. Feb. 12, 2002). But because *Bond* and *Brigian* were resolved by unreported summary orders, it is possible that the petitioners in both cases did in fact make the requisite constitutional showing even though the courts' orders mentioned only the procedural issues in need of legal clarification. In *Bond*, for example, the district court was careful to mention all seven of the petitioner's underlying constitutional claims, suggesting the petitioner may have met *Slack*'s threshold inquiry. *See Bond*, 2002 WL 460046 at *1.

Such an inference in both cases is supported by the fact that in *neither* case did the state government respondent challenge the Second Circuit's appellate jurisdiction. *See* Brief for Respondent-Appellee, *Bond*, 53 Fed. Appx. 162 (2d Cir. Sept. 27, 2002) (No. 02-2157), *available at* 2002 WL 32391985; Brief for Respondent-Appellee, *Brigian* (No. 01-2389) (on file with Respondent). Noteably, the state superintendent in this case *does* make such a challenge, despite being represented by the District Attorney for Queens County, New York, who also represented the state officials in both *Bond* and *Brigian*.

2003 WL 23336105. Likewise, in *Harrison*, even though the district court had issued COAs to both petitioners on a timeliness issue without specifying whether they had met *Slack*'s constitutional requirement, the government did not contest the Second Circuit's jurisdiction on appeal. *See* Appellee's Brief and Appendix, *Harrison v. Artuz*, 12 Fed. Appx. 56 (2d Cir. June 15, 2001) (No. 00-2445), *available at* 2000 WL 33981691; Appellee's Brief and Appendix, *Clark v. Barkley*, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) (No. 00-2695), *available on* Westlaw (no WL number).

Notably, the Superintendent does not cite a single case other than Cain's – either published or unpublished – in which the Second Circuit supposedly granted a COA to an applicant who failed to make the requisite constitutional showing. In the one case that Respondent Cain could find in which this occurred, *Catlett v. Greiner*, No. 02-2121, 76 Fed. Appx. 345, 347 (2d Cir. Jul. 2, 2003) (unreported), the Second Circuit realized its error and immediately vacated its own COA, ruling that even though the case presented an important procedural issue, the petitioner had failed to make a substantial showing of the denial of a constitutional right. A fair look at the case law, therefore, reveals that the Second Circuit carefully follows the dictates of *Slack*, *Miller-El*, and 28 U.S.C. § 2253(c)(2), just as the court did in this case.

Moreover, the other courts of appeals also carefully adhere to these requirements, despite the Superintendent's attempt to manufacture a circuit split where none exists. *Cf.* Pet. at 14-15. To support his claim that several circuits outside the Second "appear to exercise jurisdiction frequently in the absence of the requisite showing," the Superintendent selectively cites five cases from around the country, three of which are unpublished dispositions and

none of which sustains his conclusion. *See Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004); *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003); *Walker v. Warden*, No. 04-30607, 125 Fed. Appx. 568 (5th Cir. Apr. 5, 2005) (per curiam) (unreported); *Franklin v. Dretke*, No. 04-40444, 106 Fed. Appx. 926 (5th Cir. Aug. 25, 2004) (per curiam) (unreported); *Wampler v. Mills*, No. 02-5447, 60 Fed. Appx. 594 (6th Cir. Apr. 2, 2003) (unreported). In both *Day v. Crosby* and *Walker v. Crosby*, the two published Eleventh Circuit decisions cited by the Superintendent, both the federal and state government respondents explicitly asserted that the court had jurisdiction to hear the appeals. *See* Answer Brief of Appellee at 1, *Day v. Crosby* (No. 04-10778) (asserting the court's jurisdiction over the issue "as framed in the certificate of appealability") (on file with Respondent); Answer Brief of Appellee at 1, *Walker v. Crosby* (No. 01-12491) ("This court has jurisdiction pursuant to 28 U.S.C. section 2253") (on file with Respondent).

In *Franklin v. Dretke*, *Walker v. Warden*, and *Wampler v. Mills*, the cursory nature of the unpublished dispositions makes it difficult to determine precisely what conclusions the courts drew or what kind of showing the petitioners made,[7] but all three cases suggest that the courts attempted to adhere to *Slack's* mandates. In *Walker v. Warden*, the Fifth Circuit held that it could not rule out that reasonable jurists might debate "whether the claims raised . . . are valid claims of a constitutional deprivation." 125 Fed. Appx. at 568. In *Franklin*, the court granted a COA, vacated the district court's decision for procedural

[7] *See* 5th Cir. R. 47.5.4 ("Unpublished opinions . . . are not precedent"); 6th Cir. R. 28(g) ("Citation of unpublished decisions in briefs . . . is disfavored").

error, and then remanded the case "for consideration of the constitutional claims set forth in [the prisoner's] habeas petition." 106 Fed. Appx. at 926. In *Wampler*, the Sixth Circuit issued a COA to an applicant whose habeas petition raised four significant underlying constitutional claims, all of which may have satisfied the requisite substantial showing; the district court had not analyzed those claims only because the state immediately sought summary judgment on claim preclusion grounds. 60 Fed. Appx. at 595.

This handful of cases simply does not support the Superintendent's proposition that "the Second Circuit and other circuit courts routinely exercise jurisdiction" over habeas appeals while ignoring the requirements of 28 U.S.C. § 2253(c)(2). *See* Pet. at 16. Rather, a vast body of published case law – conveniently left out of the Superintendent's analysis – in each of the allegedly delinquent circuits demonstrates the universal recognition that *Slack* and *Miller-El* are the law of the land. *See, e.g.*, *Centobie v. Campbell*, 407 F.3d 1149, 1151 (11th Cir. 2005) (per curiam) (denying COA for applicant's failure to make substantial showing); *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000) (holding court could not "grant a COA on a procedural issue" if reasonable jurists "would not find it debatable both whether 'the petition states a valid claim of the denial of a constitutional right' and whether 'the district court was correct in its procedural ruling' "); *Hughes v. Dretke*, 412 F.3d 582, 590 (5th Cir. 2005) (denying COA because applicant did not show "reasonable jurists could disagree with the district court's denial of any of his claims, nor could jurists conclude that any of [his] claims deserve encouragement to proceed further"); *Cardenas v. Dretke*, 405 F.3d 244, 254 (5th Cir. 2005) (denying COA for applicant's failure to show "reasonable jurists could disagree with the district court's denial" of any

of his claims); *Houser v. Dretke*, 395 F.3d 560, 561 (5th Cir. 2004) (holding that applicant did not prove "reasonable jurists could find it debatable that the petition states a valid claim of the denial of a constitutional right"); *Cyars v. Hofbauer*, 383 F.3d 485, 492 (6th Cir. 2004) (denying COA because "reasonable jurists could not find the district court's assessment of [applicant's due process] claim debatable or wrong"); *Frazier v. Huffman* 343 F.3d 780, 788-89 (6th Cir. 2003) (holding that district court erred in issuing blanket COA without analysis because COA may issue "*only* if the applicant has made a substantial showing of the denial of a constitutional right" as "[t]he language of § 2253(c) is mandatory" (internal quotation marks omitted)).[8]

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[8] In fact, all the circuits strictly adhere to *Slack*'s mandates. *See, e.g., United States v. Lambros*, 404 F.3d 1034, 1037 (8th Cir.), *cert. denied*, 125 S.Ct. 2953 (2005) (denying COA for failure to make "a substantial showing of any error, much less constitutional error"); *Dalton v. Battaglia*, 402 F.3d 729, 738 (7th Cir. 2005) (declining to expand district court's COA to include additional claims because applicant failed to show "reasonable jurists could debate whether . . . the issues presented were adequate to deserve encouragement to proceed further"); *United States v. Vargas*, 393 F.3d 172, 174 (D.C. Cir. 2004), *reh'g denied*, 415 F.3d 23 (D.C. Cir. 2005) (denying COA because applicant could not make substantial showing since claim raised no constitutional question); *Allen v. Lee*, 366 F.3d 319, 324 (4th Cir. 2004) (*en banc*) (denying COA for claim's failure to raise "substantial constitutional question upon which reasonable jurists could disagree"); *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004) (denying multiple COAs because prisoner did not show that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . [or] whether the district court was correct in its procedural ruling"); *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (denying COA because applicant did not show reasonable jurists "would find it debatable whether . . . [his motion] states a valid claim of the denial of a constitutional right"); *DeCato v. United States*, No. 00-2118, 51 Fed. Appx. 888, 889 (1st Cir. Nov. 27, 2002) (per curiam) (unreported) (denying COA for failure to show "reasonable jurists could debate whether . . . the issues presented were

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Thus, there are no "conflicting practices" among the circuits for this Court to resolve. *Cf.* Pet. at 15. The requirements for the granting of a COA expressed in 28 U.S.C. § 2253(c)(2), and elucidated by this Court in *Slack* and *Miller-El*, are clear and well-established. These requirements were followed by the Second Circuit in this case, and by the Second Circuit and every other circuit in scores of other cases.

II. The Second Circuit's Unpublished Order Applying The Prison Mailbox Rule To Cain's *Coram Nobis* Application Does Not Merit Supreme Court Review Because The Order Is Consistent With This Court's AEDPA Jurisprudence And Has No Effect On New York Law Or Procedure. The Fact That Only A Few Circuits Have Addressed This Prison Mailbox Issue, Under A Variety Of Factual Circumstances And Dependent Upon Idiosyncrasies In State Procedural Rules, Further Counsels Against Review Until A Clear Pattern Of Decisions Emerges.

A. Because Cain's *coram nobis* application was properly filed under New York law, and the Second Circuit's ruling applies only to the federal proceedings, the decision will have no effect on New York state law or procedure.

It is undisputed that Respondent Cain's state *coram nobis* application was "properly filed" under the terms of

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adequate to deserve encouragement to proceed further"); *Szuchon v. Lehman*, 273 F.3d 299, 312, 316 (3d Cir. 2001) (denying COA on due process claims for failure to make "a substantial showing of the denial of a constitutional right").

28 U.S.C. § 2244(d)(2) and in accordance with this Court's holding in *Artuz v. Bennett*, 531 U.S. 4 (2000), because "its delivery and acceptance [were] in compliance with the applicable laws and rules governing filings" in the state of New York, *id.* at 8, and therefore appropriately tolled AEDPA's statute of limitations. Not only did the New York appellate division treat Respondent Cain's application as having been properly filed, but the issue of timing never arose during his state proceedings because New York has no deadline for the filing of *coram nobis* applications. *See People v. Langfelt*, 249 N.Y.S.2d 949 (N.Y. App. Div. 1964) (requiring lower court to consider *coram nobis* application even though it was filed two years after petitioner had been released from prison).

Importantly, the Second Circuit's opinion in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), did *not* hold that the mailbox rule can be used to overcome a state court's prior determination of untimeliness or improper filing. Rather, the opinion was carefully crafted to apply only to cases such as Cain's in which it is clear that a prisoner's postconviction application was properly filed under state law. *See id.* at 114 ("The timeliness of Fernandez's habeas petition depends upon when his state *coram nobis* petition was 'properly filed' pursuant to AEDPA's tolling provision"). Because untimely petitions are not "properly filed," *Fernandez* does not permit federal courts to treat untimely state petitions as timely. The Superintendent's assertion that the Second Circuit in *Fernandez* advocated "wholesale

adoption of the mailbox rule," *see* Pet. at 24-25, is therefore simply wrong.[9]

Because the filing date of Cain's *coram nobis* application is irrelevant to New York law and procedure, New York state courts will never be faced with the question of whether the prison mailbox rule, as announced by this Court in *Houston v. Lack,* 487 U.S. 266 (1988) (holding that *pro se* prisoners' notices of appeal are "filed" upon their delivery to prison officials for forwarding to the court), should apply to state *coram nobis* applications. As a result, there can be no conflict between New York law and the Second Circuit's decision to follow *Houston* and apply the prison mailbox rule to Cain's properly filed *coram nobis* application solely for the purpose of calculating federal tolling time under AEDPA.

Moreover, because the Second Circuit's ruling guides only a federal court's application of federal law, New York courts are free to decide on their own whether to apply the prison mailbox rule for state purposes. The Second Circuit's decision to apply the prison mailbox rule in the present case "solely for the purpose of calculating a *federal* statute of limitations" does not and cannot have any impact upon New York procedure or the state's ability to establish its own filing requirements, because a federal court can apply

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[9] The Superintendent also incorrectly suggests that the Second Circuit (presumably in *Fernandez*, as he provides no citation) "contradicted itself when it suggested that [New York] has no rule determining the time of filing." Pet. at 25. He appears to conflate rules that define how filing is to be construed with rules that prescribe a deadline after which filing, however construed, may not be accepted. The Second Circuit's statement about New York law's lack of a deadline for *coram nobis* applications, *see Fernandez*, 402 F.3d at 115, pertains to the latter type of rule.

the mailbox rule to a federal habeas petition only *after* state proceedings have been completed. *See Fernandez*, 402 F.3d at 115 n.3. Thus, the only real consequence of the Second Circuit's ruling in *Fernandez* is that prisoners who have properly filed a postconviction motion in New York will receive the benefit of the full year of AEDPA's statute of limitations, rather than be forced to file early to compensate for mailing delays or clerical error. *See id.*

B. All but one of the Circuits that have addressed this issue agree that state law should not control how federal courts calculate time tolled under AEDPA's statute of limitations.

In addition to the Second Circuit in *Fernandez* and *Cain*, only the Fifth, Ninth, and Tenth Circuits have addressed whether a federal court can apply the prison mailbox rule to a properly filed state application when calculating the amount of time tolled under AEDPA. *See Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), *cert. denied*, 531 U.S. 1195 (2001); *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999) (per curiam), *cert. denied*, 527 U.S. 1057 (2000).[10] The decisions

[10] The Superintendent's citation of *Vroman v. Brigano*, 346 F.3d 598 (6th Cir. 2003), is inapposite because, unlike the state petitions in *Anthony*, *Coleman*, *Fernandez*, and *LeMaster*, the state petition in *Vroman* was governed by a filing deadline. 346 F.3d at 602. The *Vroman* petitioner had missed this deadline and so his petition had never been properly filed and was therefore never under consideration by any state court. *Id.* at 603-604. *Vroman* therefore stands for the uncontroversial position, not inconsistent with the Second Circuit's ruling in *Fernandez*, that the prison mailbox rule cannot be used to overcome a state court's prior determination that a postconviction motion had been untimely filed. *See Vroman*, 346 F.3d at 604 ("this court will not reconsider the Ohio state courts' determination that Vroman's postconviction petition was untimely").

in *Anthony*, *Coleman*, *Fernandez*, and *LeMaster* defy easy comparison because each one is based on distinct factual circumstances and procedural ambiguities in varying state filing rules.[11] Nonetheless, the circuits are in far greater agreement than the Superintendent portrays them to be. *Cf.* Pet. at 19-20. In fact, far from the Second Circuit being "squarely in conflict with the other circuit courts," *id.*, the Second, Fifth, and Ninth Circuits all agree that state law should *not* control how a federal court calculates the amount of time tolled under AEDPA; only the Tenth Circuit has held otherwise.

Like the Second Circuit in *Fernandez*, the Ninth Circuit in *Anthony* held that once it is clear that a state application has been "properly filed," federal courts are to apply the federal mailbox rule for the purpose of calculating AEDPA tolling time. 236 F.3d at 575. The petitioner in *Anthony* had properly filed a state postconviction motion, but the Supreme Court of California had marked the petition as filed upon receipt, not mailing. *Id.* at 571, 575. The state petition's filing date, just as in Respondent Cain's case, made no difference to the outcome of the state case, but was determinative of whether the federal habeas petition was time-barred – and the federal court determined that the federal rule should apply. *Id.* at 574-75.

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[11] The Fifth, Ninth, and Tenth Circuits reiterated their holdings in, respectively, *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (citing *Coleman* as construing request that mailbox rule be applied to *pro se* habeas filing as "request for equitable relief"); *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir.), *amended by* 250 F.3d 1262, 1268 (9th Cir. 2000), *overruled on other grounds*, *Carey v. Saffold*, 536 U.S. 214 (2002); and *Moore v. Gibson*, 250 F.3d 1295, 1296, 1298 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001).

In *Coleman*, the Fifth Circuit was faced with a *pro se* petitioner who presented evidence that his Texas state postconviction motion had been mailed six weeks before the court stamped it as "filed." 184 F.3d. at 400. The result of the delay, apparently due to a state clerk's filing error, was that the petitioner's federal habeas petition would be time-barred if the federal court did not apply the mailbox rule to its consideration of the length of time tolled by the state motion. *See id.* at 402. But because Texas habeas petitions, like New York *coram nobis* applications, have no filing deadline, no Texas court was required to decide whether Texas would apply the mailbox rule to Coleman's petition, and at the time, no Texas case law revealed whether the mailbox rule would apply in such circumstances.[12] Moreover, Texas procedural rules were ambiguous on the subject. The petitioner pointed to Tex. R. Civ. P. 5, which provides that filing commences upon mailing, while the respondent argued that postconviction proceedings were controlled by Tex. R. Crim. P. art 11.07, which makes no mention of the timing of filing. *See Coleman*, 184 F.3d at 400, 402 n.1; Tex. R. Civ. P. 5 ("A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing"); Tex. R. Crim. P. art 11.07 (requiring only that an application for a writ of habeas corpus be filed "after final conviction in a felony case"). Faced with such conflicts and ambiguities, the Fifth Circuit ruled that it would not attempt to "interpret state

[12] The Texas Supreme Court subsequently announced a prison mailbox rule based on *Houston*'s principles of fairness in *Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004) ("we decline to penalize a pro se litigant for failing to obtain a postmark or a file-stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access").

rules of filing [or] to address the filing systems of state courts." 184 F.3d. at 402. Like the Second and Ninth Circuits, the Fifth Circuit decided that a federal rule should control. But rather than apply the federal prison mailbox rule, which had become the presumptive rule for the vast majority of *pro se* filings in federal courts, *see* Part II.C, *infra*, the Fifth Circuit decided instead to examine for itself the facts of the prisoner's case to see if it merited application of the federal equitable tolling doctrine. *See* 184 F.3d. at 402.

The Tenth Circuit, on the other hand, held in *LeMaster* that principles of comity *required* federal courts to defer to state law on the question of whether to apply the federal mailbox rule when calculating federal tolling time under AEDPA. 223 F.3d at 1181. The court reached that conclusion even though New Mexico, too, had no filing deadline for the state habeas petition at issue, and as a result, no state law or cases addressed whether New Mexico courts would apply the mailbox rule to such petitions. *See id.* at 1181 n.3, 1182. The court therefore was forced to engage in a tortuous attempt to "predict" whether the New Mexico Supreme Court would apply the mailbox rule to state habeas petitions – even though New Mexico courts would never face that question given the absence of a filing deadline. *See id.* at 1182-83. The Tenth Circuit concluded that the New Mexico Supreme Court "at the very least" would require receipt by the clerk before a petition would be treated as having been filed, but left open the question of whether actual filing by the clerk was necessary.[13] *See id.*

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[13] In a later case dealing with Oklahoma filing law, the Tenth Circuit chose not to discern on its own what the state's law would be in regard to the mailbox rule, and instead, because Oklahoma had a

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The Superintendent, therefore, has greatly exaggerated the extent to which the mailbox issue presented in this case has "openly divided the circuit courts of appeals." *Cf.* Pet. at 17. Three out of the four circuits to have dealt with the question declined to permit ambiguous state filing rules to control how federal courts interpret the federal AEDPA filing deadline. Thus there is no urgent need for Supreme Court intervention at this time.

C. Applying the federal mailbox rule to state postconviction proceedings for the purpose of calculating federal tolling time under AEDPA follows *Houston*'s mandate to treat *pro se* petitioners fairly and furthers the principles of comity and federalism.

The Superintendent asks this Court to use the unreported order of the Second Circuit in this case to overturn a well-established – and almost entirely uniform – body of case law applying this Court's holding in *Houston* to other circumstances in which *pro se* prisoners have no control over the time of filing of their court papers. *See* Pet. at 20. But a summary order is the wrong vehicle with which to reexamine *Houston* and its progeny. Moreover, this case also presents no compelling legal or policy justification to circumscribe application of the prison mailbox rule.

To begin with, the same fairness considerations that led this Court to announce the rule in *Houston* also apply in this case. Most fundamentally, because he was "unskilled in law,

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procedure for responding to certified questions, certified to the Oklahoma Court of Criminal Appeals the question of whether the prison mailbox rule applied in Oklahoma postconviction proceedings. *See Moore*, 250 F.3d at 1296, 1298.

unaided by counsel and unable to leave the prison," *Houston*, 487 U.S. at 271, Cain had no way to monitor the filing of his *coram nobis* application or to know when the Second Department considered it to have been filed. *See id.* (noting how *pro se* petitioners are unable to "personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice"). As a result, contrary to the Superintendent's suggestion that routine delays in the filing of state post-conviction applications "can easily be anticipated," Pet. at 21, petitioners like Cain cannot anticipate with any certainty when their one-year filing deadline will have passed. Moreover, like the *pro se* prisoner in *Houston*, Cain faced a tight filing deadline – and the consequences of the mailbox rule not being applied were potentially devastating.[14] Had the Second Circuit not reversed the district court's refusal to apply to mailbox rule, Cain's constitutional claims would have never been heard, regardless of their potential merits. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (noting that a procedural dismissal "of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

Second, application of the mailbox rule to calculations of time tolled under AEDPA brings uniformity, clarity, and

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[14] The Superintendent's argument that the lack of a state filing deadline means that *Houston*'s fairness concerns do not apply, *see* Pet. at 25, conflates the state filing process with the dictates of the federal AEDPA deadline. Because AEDPA requires petitioners to first seek relief in state courts, AEDPA's one-year statute of limitations necessarily incorporates all of the state filings that toll the statute, making the timing of state filings, regardless of whether they have deadlines of their own, critical to the federal AEDPA deadline.

efficiency to the procedures by which state inmates assert their federal rights and by which federal courts enforce those rights. A uniform policy under which federal courts apply the mailbox rule to all properly filed postconviction motions when calculating AEDPA tolling time "standardize[s] the procedures that govern how inmates assert their federal rights, regardless of whether they are in federal or state prison, and regardless of their state of incarceration." *Fernandez v. Artuz*, 175 F. Supp. 2d 682, 686 (S.D.N.Y. 2001). Such a policy is the only way prisoners can monitor the timing of their filings with a degree of predictability, allowing them to know exactly how much time remains under AEDPA's statute of limitations as they attempt to exhaust their state remedies.

In addition, federal courts, which already uniformly apply the mailbox rule to the time of filing of federal habeas petitions, *see, e.g.*, *Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), also benefit from application of the rule to state filings under AEDPA. Without the mailbox rule, enforcement of AEDPA's filing deadline can require, as the Tenth Circuit learned in *LeMaster*, divining the intentions of state courts which may never be faced with the question of whether the mailbox rule should apply. Applying the mailbox rule, on the other hand, requires only an inquiry into the date on which the prisoner handed his pleadings to prison officials for mailing.

Moreover, this task is not as "factually complex" or susceptible to misrepresentation as the Superintendent asserts. *Cf.* Pet. at 21. As the cases cited by the Superintendent demonstrate, courts generally require substantive evidence of the date of mailing before giving prisoners the benefit of the mailbox rule. *See id.* at 21-22, *citing Edgar*

Velez v. Walker, No. 02-CV-1732 (E.D.N.Y. Feb. 5, 2003), *adopted* (E.D.N.Y. Mar. 27, 2003) (finding that record of prisoner's legal mail allotments showed correct date petitioner mailed his habeas petition despite his claim of earlier date); *Darryl Gadson v. M. McGinnis*, No. 99-CV-3624 (E.D.N.Y. Apr. 22, 2002) (declining to accept petitioner's representation that he had filed habeas petition earlier but it had been returned).

In fact, the Superintendent's entire discussion of the "considerable costs" of the prison mailbox rule, *see* Pet. at 21-24, is belied by the fact that federal courts have been applying the rule to nearly all filings of *pro se* prisoners, both state and federal, for years without any apparent difficulty. Federal courts today apply the rule to the filing of Section 1983 complaints, *see, e.g., Cooper v. Brookshire*, 70 F.3d 377, 381 (5th Cir. 1995); FTCA claims, *see, e.g., Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993); administrative complaints, *see, e.g., Longenette v. Krusing*, 322 F.3d 758, 765 (3d Cir. 2003); service of discovery responses, *see, e.g., Faile v. Upjohn Co.*, 988 F.2d 985, 988-89 (9th Cir. 1993); Rule 59(e) motions to amend judgment, *see, e.g., Edwards v. United States*, 266 F.3d 756, 758 (7th Cir. 2001) (per curiam); and federal habeas petitions, *see, e.g., Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000). *See generally, Sulik v. Taney County, Mo.*, 316 F.3d 813, 815 (8th Cir. 2003) (noting that all federal circuits to consider the issue have extended the prison mailbox rule to civil complaints). If applying the mailbox rule were as difficult as the Superintendent suggests, one would imagine scores of instances of prisoner misrepresentations deceiving courts into allowing filings or granting forms of relief they should not have. But the Superintendent does not cite a single such example.

Third, application of the mailbox rule for the purpose of calculating AEDPA tolling time furthers the interests of comity and federalism by allowing state proceedings to take their course without interference by federal courts. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights"); *Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period"). Applying the mailbox rule ensures that prisoners are not penalized for attempting to exhaust their claims in state court before filing in federal court. If the mailbox rule were not applied, *pro se* prisoners would be forced to file their federal habeas petitions while their state applications are still pending because although the mailbox rule gives prisoners control over the filing dates of their federal petitions, prisoners would lack such control over when state courts choose to consider their state applications as having been filed.

The Superintendent's claim that applying the mailbox rule is unfair to the state, *see* Pet. at 26 ("[w]hen a federal court undoes an otherwise final state conviction, respect for state processes is necessarily undermined"), is essentially an argument against federal habeas itself, regardless of whether or not the mailbox rule is applied. The truth is that because the mailbox rule "already applies to a broad variety of state prisoner filings in federal actions," it cannot "implicate new burdens on the state prison system." *Fernandez*, 402 F.3d at 115 n.3. In New York, for example, state prisons have had several years of experience dealing with the application of the mailbox rule to the filing of federal habeas petitions, *see Noble*, 246 F.3d at 97-98;

Section 1983 complaints, *see Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir. 1993), *modified on reh'g*, 25 F.3d 81 (2d Cir. 1994); and administrative claims, *see Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999).

The Superintendent's final substantive argument is that Congress could not have intended "for the same word, 'filing,' to have two such different meanings simultaneously: a federal one in the first context and a state one in the second." Pet. at 26. But it is not unusual for a federal court to apply state law when determining whether an application has been properly filed, while using federal law to calculate the length of the pendency of the application. For example, in Section 1983 cases filed by *pro se* prisoners, federal courts regularly look to state law to determine the length of the applicable statute of limitations, but then use the federal prison mailbox rule to determine the actual date of filing. *See, e.g., Casanova v. Dubois*, 304 F.3d 75, 78 n.4, 79 (1st Cir. 2002) (borrowing Massachusetts' three-year statute of limitations for personal injury actions in determining length of limitations period for prisoners' Section 1983 claims, but applying federal prison mailbox rule to determine date of filing); *Lewis v. Richmond City Police Dept.*, 947 F.2d 733, 736 (4th Cir. 1991) (borrowing Virginia's two-year statute of limitations for personal injury actions, but applying federal prison mailbox rule to determine date of filing); *see also Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (applying, in a diversity case, Kentucky's one-year statute of limitations for medical malpractice claims but applying the federal prison mailbox rule to determine date of filing).

This Court's decision in *Houston* also demonstrated that the meaning of the term "filed" depends upon context. The *Houston* Court was careful to note that the mailbox

rule can only be applied in cases in which the prisoner's filings actually reach the court, no matter when they were given to prison officials. *See Houston*, 487 U.S. at 273 (distinguishing between "timing" and "destination"). Thus, in order to apply the mailbox rule, courts must always make a two-step inquiry: first, into whether the papers were ever properly filed; and second, into when the papers should be considered as having been filed. In Cain's case, following this Court's jurisprudence, the first question – proper filing – is determined by reference to New York state law, while the second question requires application of *Houston*'s federal mailbox rule.

Therefore, the Second Circuit's application of the federal prison mailbox rule to Respondent Cain's case solely to calculate time tolled under the federal AEDPA furthers the principles of comity, federalism, and fairness and thus provides no justification for Supreme Court review.

CONCLUSION

For the reasons given above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

J.L. POTTENGER, JR.
Counsel of Record
BRETT DIGNAM
THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

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No. 04-1726

IN THE

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. BROWN
District Attorney
Queens County
JOHN M. CASTELLANO*
GARY S. FIDEL
Assistant District Attorneys
125-01 Queens Boulevard
Kew Gardens, NY 11415
(718) 286-5801

* *Counsel of Record*

Attorneys for Petitioner

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Respondent Has Failed to Demonstrate that the Second Circuit Satisfied the Prerequisite to Its Exercise of Jurisdiction in this Case, and His Attempts to Deny the Conflict Among the Lower Courts on This Issue Are Unpersuasive.

In his Brief in Opposition to the Petition for Certiorari, respondent Cain does not dispute that he was required, under this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), to make a substantial showing of the denial of a constitutional right in order for the Second Circuit to exercise jurisdiction over the appeal. Similarly, respondent does not dispute that neither the district court nor the Second Circuit ever made such a finding in any of its orders or opinions, and indeed never addressed the issue in any manner whatsoever. Nevertheless, respondent asserts that the Second Circuit lawfully exercised jurisdiction, arguing that because such a requirement exists, the Second Circuit must have found that a substantial showing had been made. Respondent aiso attempts to establish, in his Brief in Opposition, the existence of constitutional issues satisfying the substantial showing requirement. Finally, respondent flatly asserts that no conflict exists among the lower courts on this issue. None of these arguments are persuasive.

Respondent's first contention fails because it simply assumes that the Second Circuit must have exercised jurisdiction properly. Under respondent's argument, the mere existence of the requirement establishes that it must have been found to have been satisfied. But, in the absence of any suggestion in the record of this case that the issue was ever addressed or the requirement cownsidered below, the

assumption is based on nothing more than conjecture.

Moreover, respondent's assumption cannot be justified by looking at this matter as an aberrational case – one in which the court merely forgot to mention its conclusion on this issue – as respondent suggests. The failure to require or address the necessary showing is common both inside and outside the Second Circuit. Notwithstanding respondent's preference for published decisions, numerous opinions establish that it is routine to grant certificates of appealability without considering whether the requisite showing has been made. Cert. Pet. at 13-14. Because the issue is both jurisdictional and affects many cases, it deserves this Court's attention.

Nor is respondent's attempt to make the requisite showing at this juncture appropriate. The fact that the lower courts in this case failed to consider the issue is sufficient to establish the wrongfulness of the Second Circuit's assumption of jurisdiction. At the very least, this unlawful exercise of jurisdiction justifies a directive from this Court, even if only in a summary order, to consider the necessary prerequisite.

Moreover, the purported "substantial showing" respondent now offers is anything but that. Respondent maintains that he has an obviously-worthy constitutional claim in that his arrest was the product of the allegedly coerced confession of his co-defendant. Bf. Opp. at 8-9. But the state court, after hearing evidence from six police witnesses, an assistant district attorney, and the co-defendant, specifically rejected the factual contentions that the co-defendant had been beaten by the police and that his confession had been coerced. *See People v. Amaury Rosario, Sean Estrella, and Almein Cain*, Ind. No. 5644/95, at 2-7 (Sup.Ct. Queens Co. March 31, 1997)

(RA 2-7).[1] This factual finding is presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and respondent has offered nothing to undermine this conclusion since the time of the state court hearing. Because this factual finding easily disposes of this claim, respondent's contention does not satisfy the statutory standard, much less establish that the Second Circuit "must have" adopted it.

In addition, respondent now claims to have made a substantial showing of the denial of a constitutional right based on a purportedly suggestive lineup. Bf. Opp. at 9. But he made no such claim in his application for a certificate of appealability, and there is no reason to believe that the panel considered the claim *sua sponte*. Moreover, respondent did not raise the issue in his brief on appeal in response to the jurisdictional objection by the state, even though respondent was then represented by the same firm that represents him now. Thus, this claim cannot justify the conclusion that the Second Circuit "must have" adopted it, without it being raised or mentioned, and "must have" based its exercise of jurisdiction upon it.

Respondent also appears to complain that the state is demanding a finding on the "merits," not authorized or appropriate because "a COA determination is *not* a 'merits determination.'" Br. Opp. at 10 (emphasis in original). But the state has never maintained that the Second Circuit should have made an ultimate merits determination on any of Cain's issues, only that some preliminary showing of the denial of a constitutional right was required under *Slack* before jurisdiction could be exercised. Respondent's objection then is entirely

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[1]Numbers in parentheses preceded by RA refer to the Respondent's Appendix in the Second Circuit.

inapposite.

Respondent also attempts to deny that any conflict exists among the circuits on this issue, pointing to many cases in which courts have required a showing of a denial of a constitutional right. Br. Opp. at 10-11, 15-16. But most of the cited cases do not implicate any procedural issue whatsoever or discuss *Slack's* two-pronged test.[2] They shed no light, therefore, on the current question. The remainder of the cases establish no more than that courts apply the *Slack* rule where the district court has held, as in *Slack* itself, that particular claims were barred based on an independent and adequate state ground or a lack of exhaustion.[3] These cases are also of limited relevance. There is no doubt that the lower courts follow *Slack* in the precise context of that case, as indeed they must. The issue that has engendered such confusion is the application of *Slack* to statute of limitations dismissals. Indeed, many lower courts have failed to observe the *Slack* requirement in these circumstances, as explained at length in the Petition for Certiorari. Cert. Pet. at 13-14. Thus, citations to the distinct, and non-controversial, issues identified by respondent do not address, and cannot eliminate, the conflict over the separate question of *Slack*'s application to timeliness dismissals. Moreover, it is precisely because the cases cited by petitioner do

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[2]These cases include *Centobie v. Campbell*, 407 F.3d 1149 (11th Cir. 2005); *Hughes v. Dretke*, 405 F.3d 582 (5th Cir. 2005); *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005); *Morales v. Greiner*, 381 F.3d 47 (2d Cir. 2004); *United States v. Outen*, 286 F.3d 622 (2d Cir. 2002); *Cyars v. Hoffbauer*, 383 F.3d 485 (6th Cir. 2004).

[3]These cases include *Houser v. Dretke*, 395 F.3d 560 (5th Cir. 2004); *Jones v. Keane*, 329 F.3d 290 (2dCir. 2003), *cert. denied*, 540 U.S. 1046 (2003); *Eltayib v. United States*, 294 F.3d 397 (2d Cir. 2002); and *Franklin v. Hightower*, 215 F.3d 1196 (11th Cir. 2000).

not treat the disputed issue here that they were "conveniently left out" of the petition for certiorari. Br. Opp. at 15.

Nor are respondent's attacks on the state's citation of relevant caselaw – treating the application of *Slack* to statute of limitations dismissals – adequate to dispel the conflict. For example, as to *Franklin v. Dretke*, 106 Fed. Appx. 926 (5th Cir. 2004), respondent concedes that the circuit court granted a COA on the timeliness issue without ever addressing whether the petitioner had made a substantial showing of the denial of a constitutional right, and that the court reversed the lower court's ruling, thus clearly exercising jurisdiction over the matter. He points out, however, that the circuit court remanded the case for consideration of the constitutional claims set forth in the petition. But this hardly establishes that the circuit court considered the necessary substantial showing requirement before it granted a certificate of appealability and reversed; indeed, the circuit court does nothing more than direct the lower court to consider the merits once the court overturned the statute of limitations dismissal.

As to several other cases,[4] respondent asserts that the state did not object to jurisdiction in their briefs on appeal. Br. Opp. at 13-14. But the state's failure to object did not obviate the statutory jurisdictional requirement, which those courts were bound to address in any event. And the state's failure to object in those cases certainly did not bind the state here, which did assert the jurisdictional defect, and, as a result, the Second Circuit could not properly ignore the issue, as it in fact did.

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[4] *Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004); *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003); and *Harrison v. Artuz*, 105 F.Supp. 2d 101 (E.D.N.Y. 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. Appx. 332 (2d Cir. 2002).

And as to still other cases,[5] respondent offers little argument, other than to say that these are unpublished decisions. But, whether published or unpublished, these decisions attest to the fact that it is common within the Second Circuit, and some other circuits, to grant COAs with regard to timeliness dismissals without consideration of the statutory prerequisite. Whether formally adopted or not, the practice exists and is widespread, and for this reason, and because it is the basis for jurisdiction on appeal, should be addressed by this Court.

Finally, respondent's citation to *Catlett v. Greiner*, 76 Fed. Appx. 345 (2d Cir. 2003), is inapposite. In that case, the Second Circuit held that it would not review the denial of the State's motion to dismiss in the district court upon an appeal by the habeas petitioner, and held that, in any event, the petition was properly denied by the district court on the merits. In arriving at this result, the Second Circuit did not, in fact, even cite *Slack*, but clearly disposes of the timeliness in this manner because, in this posture, "the [timeliness] issue presents us with no case or controversy on which petitioner could be granted habeas relief." *Id.* at 347. The case does not therefore establish that the Second Circuit adheres to *Slack* in this context.

In sum, because respondent is unable to erase the conflicting practices of different courts or to resolve what must at the very least be considered immense confusion over the requirements for exercising jurisdiction on appeals from timeliness dismissals, this Court should grant the certiorari.

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[5] *Bond v. Walsh*, 2002 U.S. Dist. Lexis 4826 (E.D.N.Y. February 12, 2002), *dismissal vacated*, 53 Fed. Appx. 162 (2d Cir. 2002); *Harrison v. Artuz*, 105 F.Supp. 2d 101 (EDNY 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. App. 332 (2d Cir. 2002); *Brigian v. Artuz*, 37 Fed. Appx. 559 (2002).

II. Despite Respondent's Characterization of the Law, the Circuit Courts are Divided Over the Application of the Federal Mailbox Rule of *Houston v. Lack*, 487 U.S. 266 (1988) to State Court Filings, and this Conflict Merits the Attention of this Court.

In his Brief in Opposition, respondent attempts to deny the existence of any conflict between the circuits on the application of *Houston v. Lack* , 487 U.S. 266 (1988), to state post-conviction petitions under the tolling provision of the habeas corpus statute of limitations. He also argues that this extension of *Houston* would pose little or no problem to the states, which must deal with the rule as applied in federal court in any event. Finally, he points out that New York does not impose a deadline on coram nobis petitions, such as the one he filed in state court in this case, concluding from this both that his petition was "properly filed" and that the state has no interest contrary to the application of the mailbox rule here. These arguments are unavailing.

First, respondent's attempts to deny the conflict are belied by the decisions of the Second Circuit itself, which has expressly acknowledged it. For example, in *Catlett v. Greiner*, 76 Fed. Appx. 345 (2d Cir. 2003), cited by respondent, the Second Circuit recognized that "[t]he applicability of the prison mailbox rule to state filings that toll a federal statute of limitations is an issue that has divided federal circuit courts." *Id.* at 346. The court noted, as did the state here in the Petition for Certiorari, that "[t]he Fifth, Tenth, and Eleventh Circuits have declined to apply the rule to state court filings," and that the Ninth Circuit had ostensibly come to a different conclusion, *Id.* at 346-47. Similarly, in *Fernandez*, the Second Circuit acknowledged that while the Ninth Circuit appeared to apply the mailbox rule, "[o]ther circuits . . . defer to the state court's application of state filing laws." *See also* 28-671 Moore's

Federal Practice, Criminal Procedure §671.02 ("the courts are split as to whether the tolling period begins on the date that a pro se petitioner mailed a state post-conviction petition to the state court or on the date when it was received and filed"). Thus, there can be no question that the conflict is real and not "manufactured," as respondent suggests.

Second, respondent's contention that the rule imposes no burdens on the state, as the state must deal with the rule as applied to federal court filings in any event, is simply wrong. To the contrary, the state must shoulder a vastly increased burden of the costs associated with the mailbox rule if it is used to toll for every state post-conviction application. Cert. Pet. at 21-23. The difficulties in discovering and litigating the actual date on which the relevant papers are handed to prison authorities, a process which has engendered substantial litigation in the habeas context, are dramatically increased when they are multiplied by the number of state court petitions in a given case, which often rises into the dozens. Records dating back years must be unearthed, and in a prison system the size of New York's, the task is monumental, resulting in the inability to dispute these old claims. That inability, in turn, opens the door to petitioners who are far too ready to take advantage of the opening and make baseless assertions about when their filings have been sent. Indeed, respondent here did precisely this, claiming that his petition was sent some five months before it could possibly have been given to prison authorities (a fact "conveniently left out"of the Brief in Opposition). And while particularly some petitioners such as respondent Cain may occasionally be caught, in the vast majority of cases the district courts are forced to simply take the prisoners' assertions at face value. These added periods of delay, routinely brought about by manipulation, dramatically undermine the habeas corpus statute of limitations and cripple it as an independent restraint supporting the finality of convictions.

Third, respondent's observation that New York does not preclude coram nobis petitions on timeliness grounds is also unavailing. To the extent that he uses this observation to establish that his petition was "properly filed," it is beside the point. After all, if respondent's coram nobis petition were precluded by the state on timeliness grounds, no tolling would be afforded to him at all, and the question presented here of when to commence the tolling period would never arise. *See Pace v. Diguglielmo*, 125 S.Ct. 1807 (2005).

To the extent that he suggests that the state's failure to impose a time bar demonstrates that the state has no stake, in the form of a comity interest or otherwise, in the application of the mailbox rule to state petitions, he is grossly mistaken. At the very least, the state must bear the considerable costs that the new rule would engender. More importantly, these multiplied costs place the state in a position of having to deal in state court with the substantial problems of proof spawned by the mailbox rule, even though the state does not adhere to the mailbox rule. Thus, states would be forced to enact or devise rules requiring proof of delivery to prison authorities for all state motions, akin to Federal Rule of Appellate Procedure 4(c), which requires an affidavit from the defendant. Indeed, even this rule is far from satisfactory, as it may be easily circumvented, and more rigorous versions will undoubtedly be necessary to avoid the problems of proof. And rules addressing these issues become necessary even though the state operates on a system as to which receipt constitutes filing, and as to which delivery to prison authorities is irrelevant.

Indeed, in this context, it does not matter whether the state imposes a time bar on any particular state court filing. It is enough that the state court system is forced into a position of having to alter its rules for the delivery and acceptance of state court filings to deal with the problems presented by a federal

rule it has never adopted. Comity requires, at a minimum, respect for state court rules. The forced adoption, at the behest of the federal courts, of new state court rules as to state filings in order to address a problem that the state courts have chosen to deal with differently from the federal courts fails to show proper respect for the state's rules and substantially undermines fundamental comity principles.

In short, while the costs associated with the mailbox rule may be acceptable to the federal courts in the context of their own litigation, it is a vastly different question whether the federal government may force the states to bear the dramatically increased costs that would arise if the rule were applied to state court filings. It is even more problematic to suggest that the states should alter their rules regarding the delivery and acceptance of state court filings in order to deal with problems of proof that do not exist within the state system. It is for these reasons that several federal circuit courts have declined to extend *Houston*, with its considerable associated costs, to this context. And it is for this reason that this Court should take the opportunity to address the limits of the Houston doctrine, particularly in light of the finality and comity interests that are at stake and the substantial disagreement among the circuit courts on this issue.

Respectfully submitted,

RICHARD A. BROWN
District Attorney, Queens County

JOHN M. CASTELLANO*
Assistant District Attorney
**Counsel of Record for the Petitioner*

September 19, 2005